



**MISSISSIPPI CODE 1972**  
*Annotated*

**Criminal Procedure**

**Title 99**

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# MISSISSIPPI CODE

## 1972

*ANNOTATED*

ADOPTED AS THE OFFICIAL CODE OF THE  
STATE OF MISSISSIPPI  
BY THE  
1972 SESSION OF THE LEGISLATURE

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**VOLUME TWENTY-ONE A**

**CRIMINAL PROCEDURE**

**§§ 99-1-1 to 99-45-9**

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CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI  
TO THE END OF THE 2007 REGULAR LEGISLATIVE SESSION  
AND 1ST EXTRAORDINARY SESSION



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## PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER  
ATTORNEY GENERAL





## PUBLISHER'S FOREWORD

This 2007 Replacement Volume 21A of the Mississippi Code of 1972 Annotated represents material appearing in both the original 1973 bound volume and the 2000 Replacement Volume 21A, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2007 Regular and 1st Extraordinary Legislative Sessions.

This volume contains the text of Title 99, of the Mississippi Code of 1972 Annotated, as amended through the 2007 Regular and 1st Extraordinary Legislative Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates up to June 7, 2007, and decisions of the appropriate federal courts with decision dates up to April 24, 2007. These cases will be printed in the following reporters:

- Southern Reporter, 2nd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 2nd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 5th Series
- American Law Reports, Federal Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

## **PUBLISHER'S FOREWORD**

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at [customer.support@bender.com](mailto:customer.support@bender.com), or write to: Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

August 2007

LexisNexis

## **User's Guide**

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
- Advance Sheets
- Amendment Notes
- Analyses
- Attorney General Opinions
- Code Status
- Comparable Legislation from other States
- Court Rules
- Cross References
- Editor's Notes
- Effective Dates
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- Judicial Decisions
- Organization and Numbering System
- Placement of Notes
- Replacement Volumes
- Research and Practice References
- Source Notes
- Statute Headings
- Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at [customer.support@bender.com](mailto:customer.support@bender.com), or writing to Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

### **ADVANCE CODE SERVICE**

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

### **ADVANCE SHEETS**

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and



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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

## AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

## ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

## ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

## CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

The text of Chapter 394 is printed in Volume 1, on the pages following the Publisher's Foreword. In addition, Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

## COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooper-

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ation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

## COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

## CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects*.

## EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

## EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

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### FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

### INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

### JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

### JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note



will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

### ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

### PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute section or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

### REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

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### RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

### SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

### STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

### TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

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### CHAPTER 1

#### General Provisions; Time Limitations; Costs

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## § 99-1-1. Applicability of statutes relating to procedure and appeals generally.

All statutes of this state relating to practice and procedure and appeals which, prior to the adoption of this Mississippi Code of 1972, were applicable to criminal cases shall continue to be applicable to criminal cases in the same manner and to the same extent as before, notwithstanding the classification and arrangement of such statutes in this code.

**SOURCES:** [No history available for this section.].

**Cross References** — Rights of accused in criminal prosecution, see Miss Const Art. 3, § 26.

Acquisition of control shares as not constituting control share acquisition when made pursuant to laws of descent and distribution under Section 91-1-1 et seq., see § 79-27-5.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## RESEARCH REFERENCES

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

Mandiberg and Smith, Crimes Against the Environment (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

## § 99-1-3. Common-law offenses recognized.

Every offense not provided for by the statutes of this state shall be indictable as heretofore at common law.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 1(48); 1857, ch. 64, art. 355; 1871, § 2862; 1880, § 3097; 1892, § 1452; Laws, 1906, § 1525; Hemingway's 1917, § 1287; Laws, 1930, § 1312; Laws, 1942, § 2560.

## JUDICIAL DECISIONS

**1. In general.**

Suicide is a common-law offense. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

The right is reserved to the state to prosecute crimes which were indictable at

common law even though they may not be denominated as such or be provided for by the statute of the state. *State ex rel. Maples v. Quinn*, 217 Miss. 567, 64 So. 2d 711 (1953).

## ATTORNEY GENERAL OPINIONS

Misprison of a felony is not an offense that may be prosecuted in the State of

Mississippi. *Mitchell*, January 23, 1998, A.G. Op. #98-0019.

## RESEARCH REFERENCES

**ALR.** Libel and slander: necessity of expert testimony to establish negligence

of media defendant in defamation action by private individual. 37 A.L.R.4th 987.

**§ 99-1-5. Time limitation on prosecutions.**

A person shall not be prosecuted for any offense, with the exception of murder, manslaughter, aggravated assault, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(1) (c), (d) or (2) or exploitation of children as described in Section 97-5-33, unless the prosecution for such offense be commenced within two (2) years next after the commission thereof, but nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 65, art. 2(52); 1857, ch. 64, art. 247; 1871, § 2766; 1880, § 3002; 1892, § 1342; *Laws*, 1906, § 1414; *Hemingway's* 1917, § 1169; *Laws*, 1930, § 1194; *Laws*, 1942, § 2437; *Laws*, 1912, ch. 261; *Laws*, 1989, ch. 567, § 1; *Laws*, 1990, ch. 412, § 1; *Laws*, 1993, ch. 440, § 1; *Laws*, 1998, ch. 582, § 1; *Laws*, 2003, ch. 497, § 1; *Laws*, 2004, ch. 539, § 1, eff from and after July 1, 2004.

**Cross References** — Absence from state as toll of statute of limitations in civil actions, see § 15-1-63.

Applicability of this section to violations of law or regulations relating to wild animals, birds, or fish, see § 49-5-41.

Commencement of prosecution, see § 99-1-7.

Additional year allowed for reindictment in certain cases, see § 99-1-9.

## JUDICIAL DECISIONS

1. Generally.
2. Application to continuing offenses.
3. Pleading.
4. Miscellaneous.

**1. Generally.**

Where defendant was charged with possession of marihuana, the failure of the first grand jury to return a true bill against him did not terminate the prosecution against him. The two-year statute of limitations under Miss. Code Ann. § 99-1-5 was not a bar to his prosecution where he was arrested for the offense within two years of the date in which he allegedly committed it. *State v. Parkman*, 906 So. 2d 888 (Miss. Ct. App. 2005).

Prosecution of defendant for sexual battery commenced, for the purposes of the statute of limitations, when defendant was indicted, 17 months after the date of the alleged offenses; the fact that defendant was tried more than two years after the date of the offenses went only to whether defendant's speedy trial rights had been violated and not to whether the statute of limitations had run. *Agee v. State*, 829 So. 2d 726 (Miss. Ct. App. 2002).

The statute of limitations in a criminal case is not jurisdictional but is an affirmative defense that may be waived; thus, where pursuant to an agreement a substituted and amended information is filed which charges a new and different offense, prosecution of which is on its face barred by the applicable statute of limitations, a voluntary plea of guilty by a counseled defendant operates to waive the statute of limitations and forfeit the defendant's right to raise the matter in a collateral proceeding. *Conerly v. State*, 607 So. 2d 1153 (Miss. 1992).

A simple delay between the date of an offense and the date of the indictment is not per se reversible error, particularly when the reason for the delay is for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he or she may continue to work effectively as an agent. Thus, a defendant was not denied his right to a speedy trial where a 10-month delay from

the time of the criminal act to the charge and arrest was caused by the State's pursuance of a continuing undercover operation. *Dedeaux v. State*, 519 So. 2d 886 (Miss. 1988).

In a prosecution for false pretenses, the trial court properly refused to quash the indictment, despite defendant's contention that the indictment charged only conspiracy, a crime not excepted from the two year statute of limitations, and that the prosecution was thus barred; conspiracy is a complete offense in itself and does not merge with the underlying crime, and the fact that a conspiracy is committed along with the crime does not change the nature of the offense nor lessen exposure to punishment. Furthermore, the prosecution was not time barred even though defendant was charged with being an accessory only, which is a separate crime not excepted from the statute, since an accessory before the fact to an excepted felony is treated as a principal. *Harrigill v. State*, 381 So. 2d 619 (Miss. 1980), cert. denied, 446 U.S. 939, 100 S. Ct. 2159, 64 L. Ed. 2d 792 (1980).

General two-year statute of limitations sets limits on stale prosecutions. *Campbell v. State*, 309 So. 2d 172 (Miss. 1975).

In a prosecution for the sale of marijuana, defendant was not denied due process because of pre-indictment and pre-trial delays between the night of the sale and the date of the indictment, where the delays were for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he may continue to work effectively and where the indictment was returned within the two-year time limit during which prosecutions may be commenced; the defendant's right to a speedy trial as regards delay of prosecution could have accrued no earlier than the date of the return of the indictment. *Page v. State*, 295 So. 2d 279 (Miss. 1974).

This section [Code 1942, § 2437] was not applicable in prosecution of a supervisor whose charge of employing a relative to work on the public roads and who instead employed him on his private farm and paid him out of public moneys, and who was prosecuted under Code 1942,



§ 2123. *Blakeney v. State*, 228 Miss. 162, 87 So. 2d 472 (1956).

Prosecution for the crime of escaping jail, begun more than two years after the escape, was barred by limitations. *Smith v. State*, 17 So. 2d 802 (Miss. 1944).

Where two years and forty-two days elapsed from the date the offense of placing an obstruction on a railroad track whereby a train or part thereof might be derailed was committed to the date the prosecution was begun, and the state did not prove nor attempt to prove, nor was there any evidence on which it could be said that defendant was absent from the state any single day except at the time of his arrest, conviction must be reversed and remanded. *McCullar v. State*, 183 So. 487 (Miss. 1938).

The statute held applicable to bar a prosecution for obtaining food and lodging with intent to defraud a hotel owner. *Steele v. State*, 121 Miss. 540, 83 So. 725 (1920).

## 2. Application to continuing offenses.

In prosecution of father for desertion and failure to provide for support and maintenance of child, testimony offered by prosecution and by defendant which covers period of four and one-half years prior to return of indictment is competent, since alleged offense is continuing one, and it is error for court to confine testimony on behalf of defendant to period of two years prior to return of indictment. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Statute of limitations does not apply to continuous offense where some portion thereof is within period, although another portion thereof is not within period of limitations. *Horton v. State*, 175 Miss. 687, 166 So. 753 (1936).

Offense of child desertion is a continuing one, so that prosecution therefor was not barred by three-year statute of limitations, where father deserted family more than two years before prosecution was commenced, but never returned. *Horton v. State*, 175 Miss. 687, 166 So. 753 (1936).

## 3. Pleading.

Petitioner was properly denied post-conviction relief after he pled guilty to two

counts of sexual battery against a child under the age of 14 where his argument that his prosecution was barred by the applicable statute of limitations was barred; petitioner's plea was voluntarily given and the statute of limitations defense was waived. *Laster v. State*, — So. 2d —, 2007 Miss. App. LEXIS 6 (Miss. Ct. App. Jan. 9, 2007).

Amending the date of the offense from "during the month of July" to "sometime in May or June" was allowed because it was immaterial to the merits of the case and the defense would not be prejudiced by the amendment. *Crawford v. State*, 754 So. 2d 1211 (Miss. 2000).

The statute cannot be set up by a demurrer to an indictment, although on its face the prosecution appear to be barred. The defense of limitation can be made by special plea in which case the state can supply the facts if any which take the case out of the statute or the defense can be raised on the evidence under "not guilty." *Thompson v. State*, 54 Miss. 740 (1877).

## 4. Miscellaneous.

The state had an unlimited timetable in which to reindict the defendant for aggravated assault after a nolle prosequi was entered concerning the charges in the original indictment, even though the crime at issue was committed before the statute was amended to include the crime of aggravated assault within the list of crimes that are excepted from the general two-year statute of limitation, since the extension of the limitation period in no way altered the definition of the crime with which the defendant was charged. *Smoot v. State*, 780 So. 2d 660 (Miss. Ct. App. 2001).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. *Christmas v. State*, 700 So. 2d 262 (Miss.



1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

A defendant waived and forfeited his right to assert the statute of limitations under this section as a defense to a charge of aggravated assault when he failed to assert it in the lower court and thereafter entered a voluntary and counseled plea of guilty to the charge. *Conerly v. State*, 607 So. 2d 1153 (Miss. 1992).

The two-year statute of limitations applies solely to prosecutions and does not

operate to recast the status of a defendant as a prior offender so as to affect conviction of one charged as a second offender under statute making it unlawful to possess or sell intoxicating liquors pursuant to indictment wherein previous conviction charged occurred more than two years prior thereto. *McGowan v. State*, 200 Miss. 270, 25 So. 2d 131 (1946), error overruled, 200 Miss. 281, 26 So. 2d 70 (1946).

### ATTORNEY GENERAL OPINIONS

Obtaining money or property by use of bad check would be excluded from general two-year statute of limitations. *Horan*, July 10, 1991, A.G. Op. #91-0469.

Fact that defendant is out on bond, in prison or in jail in another state does not prevent commencement of prosecution within two year time frame. *Stuart*, March 9, 1994, A.G. Op. #93-0829.

A prosecution for fraud in connection with state or federally funded assistance

programs under Miss. Code Section 97-19-71 must be commenced within two years from the commission of such offense, but a prosecution under Miss. Code Section 97-7-42 for the fraudulent use of food coupons dispensed by the state welfare department may begin at any time without a time limitation. *Taylor*, July 18, 1997, A.G. Op. #97-0407.

### RESEARCH REFERENCES

**ALR.** Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged. 47 A.L.R.2d 887.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes. 77 A.L.R.3d 689.

When statute of limitations begins to run on charge of obstructing justice or of conspiring to do so. 77 A.L.R.3d 725.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 291 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 285 et seq.

## § 99-1-7. Time limitation on prosecutions; commencement of prosecution.

A prosecution may be commenced, within the meaning of Section 99-1-5 by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.

**SOURCES:** Codes, 1857, ch. 64, art. 248; 1871, § 2767; 1880, § 3003; 1892, § 1343; Laws, 1906, § 1415; Hemingway's 1917, § 1171; Laws, 1930, § 1195; Laws, 1942, § 2438.

## JUDICIAL DECISIONS

### 1. In general.

Defendant was first arrested (for possession of marihuana), on September 20, 2000, and an arrest warrant charging him with possession of a controlled substance was issued on September 21. Thus, under Miss. Code Ann. § 99-1-7 prosecution commenced within the meaning of Miss. Code Ann. § 99-1-5 at that time, and the issue was whether the failure of the first grand jury to return a true bill against him terminated the prosecution against him; the appellate court agreed with those jurisdictions which held that in the absence of a statute or court order, the return of a no bill by a grand jury did not terminate the prosecution of the offense which was the subject of the no bill, and therefore, the lack of action against defendant by the first grand jury did not terminate the prosecution against him, and since there was no dispute that he was arrested for the offense within two years of the date in which he allegedly committed it, his prosecution was not time barred. *State v. Parkman*, 906 So. 2d 888 (Miss. Ct. App. 2005).

Prosecution of defendant for sexual battery commenced, for the purposes of the statute of limitations, when defendant was indicted, 17 months after the date of the alleged offenses; the fact that defendant was tried more than two years after the date of the offenses went only to whether defendant's speedy trial rights had been violated and not to whether the statute of limitations had run. *Agee v. State*, 829 So. 2d 726 (Miss. Ct. App. 2002).

Although an indictment is required to prosecute one charged with a felony, for purposes of the statute of limitations, a prosecution can be commenced by the issuance of a warrant or by an arrest. *State v. Woodall*, 744 So. 2d 747 (Miss. 1999).

Prosecution had commenced and, therefore, the defendant's constitutional right

to counsel had attached at the time of a line up where an arrest warrant had issued and the defendant was in custody. *Livingston v. State*, 519 So. 2d 1218 (Miss. 1988).

Once proceedings against a defendant reaches the accusatory stage, a right of counsel attaches, and, for purposes of the state constitutional right, the advent of the accusatory stage is determined by references to state law, including Mississippi Code § 99-1-7 and Rule 1.04, Unif. Crim. R. Civ. Ct. Proc. Page v. *State*, 495 So. 2d 436 (Miss. 1986).

In a criminal prosecution for kidnapping and murder, defendant's right to counsel had attached since criminal proceedings had been started under § 99-1-7. *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351 (1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366 (1985).

A criminal prosecution is not begun before a justice of the peace by affidavit for, and issuance and execution of, a search warrant without the filing of an affidavit with the justice of the peace to charge the accused with the unlawful possession of intoxicating liquor against the peace and dignity of the state. *Ratcliff v. State*, 199 Miss. 866, 26 So. 2d 69 (1946).

The crime charged must be shown to have been committed within the period of statutory limitations and after the passage of the particular statute before imposition of a penalty can be prescribed. *McLaughlin v. State*, 133 Miss. 725, 98 So. 148 (1923).

One charged with embezzlement and arrested and held to bail has had prosecution commenced against him within the meaning of this statute. *State v. Hughes*, 96 Miss. 581, 51 So. 464 (1910), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

## ATTORNEY GENERAL OPINIONS

Fact that defendant is out on bond, in prison or in jail in another state does not prevent commencement of prosecution

within two year time frame. Stuart, March 9, 1994, A.G. Op. #93-0829.

## RESEARCH REFERENCES

**ALR.** Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 291 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 285 et seq.

### § 99-1-9. Time limitation on prosecutions; additional year allowed in certain cases.

When an indictment shall be lost or destroyed, or quashed or abated, or the judgment thereon arrested or reversed for any defect therein or in the record, or for any matter of form or other cause, not being an acquittal on the merits, the further time of one year from the time when such indictment shall be lost, destroyed, quashed or abated, or the judgment thereon arrested or reversed, shall be allowed for the finding of a new indictment.

**SOURCES:** Codes, 1857, ch. 64, art. 249; 1871, § 2768; 1880, § 3004; 1892, § 1344; Laws, 1906, § 1416; Hemingway's 1917, § 1172; Laws, 1930, § 1196; Laws, 1942, § 2439.

## JUDICIAL DECISIONS

### 1. In general.

The statute does not apply to limit the time for a reindictment following the entry of a nolle prosequi by the state. *Smoot v. State*, 780 So. 2d 660 (Miss. Ct. App. 2001).

This statute prolongs the time in cases where without it the prosecution would be barred, but it does not bar prosecutions under any circumstances to which no other limitation applies. *Thompson v. State*, 54 Miss. 740 (1877).

## RESEARCH REFERENCES

**ALR.** Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 291 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 285 et seq.

### § 99-1-11. Costs of search warrant and certain criminal prosecutions.

The person who procures a search warrant, or who charges another with any crime or misdemeanor against his person or property before any court,



without reasonable cause, may be required by the court to pay the costs incurred; and judgment may be entered and execution issued therefor.

**SOURCES:** Codes, 1880, § 3119; 1892, § 888; Laws, 1906, § 965; Hemingway's 1917, § 674; Laws, 1930, § 681; Laws, 1942, § 1592.

**Cross References** — Affidavit to obtain search warrant, see § 99-25-15.

## JUDICIAL DECISIONS

### 1. In general.

Circuit court has no jurisdiction of appeal from justice court of prosecuting witness taxed with costs for instituting pros-

ecution without reasonable cause. *Town of Lumberton v. Peyton*, 143 Miss. 777, 109 So. 740 (1926).

## ATTORNEY GENERAL OPINIONS

Prior to assessing court costs to an affiant who fails to appear on the trial date, the justice court would have to make a determination that the affiant initiated

the charges without reasonable cause. The affiant would have to be afforded due process. *Shirley*, Apr. 30, 2004, A.G. Op. 04-0181.

## RESEARCH REFERENCES

**ALR.** Seizure of property as evidence in criminal prosecution or investigation as compensable taking. 44 A.L.R.4th 366.

**Am Jur.** 20 Am. Jur. 2d, Costs §§ 102 et seq.

**CJS.** 20 C.J.S., Costs §§ 439, 440.

### §§ 99-1-13 and 99-1-15. Repealed.

Repealed by Laws, 1977, ch. 408, § 2, eff from and after passage (approved March 29, 1977), and further providing that any funds previously collected under said section shall be paid to the circuit clerk of each county and utilized in accordance with the provisions of this section.

§ 99-1-13. [Codes, 1942, § 1594.5; Laws, 1962, chs. 298, 304; 1964, ch. 321; 1968, ch. 331, § 1; ch. 332, § 1; 1969, Ex Sess, ch. 21, § 1; 1971, ch. 420, § 1; 1972, ch. 442, §§ 1, 2]

§ 99-1-15. [Codes, 1942, § 1594.7; Laws, 1970, ch. 338, § 1]

**Editor's Note** — Former § 99-1-13 was entitled: Library fees collected as costs in certain counties.

Former § 99-1-15 was entitled: Library fees collected as costs; additional counties.

### §§ 99-1-17 through 99-1-21. Repealed.

Repealed by Laws, 1990, ch. 329 § 12, eff from and after October 1, 1990.

§ 99-1-17. [En Laws, 1983, ch. 545, § 1; 1985, ch. 440, § 7, 1986, ch. 502, § 5]

§ 99-1-19. [En Laws, 1983, ch. 545, § 2; 1986, ch. 502, § 6]

§ 99-1-21. [En Laws, 1983, ch. 545, § 3; 1986, ch. 502, § 7; 1987, ch. 456, § 18]



**Editor's Note** — Former § 99-1-17 related to correctional facility construction costs imposed for misdemeanor and felony convictions in addition to other fines and costs.

Former § 99-1-19 related to fees imposed upon professional bondsmen and fees imposed upon defendants.

Former § 99-1-21 related to collection and disposition of costs and fees.

### **§ 99-1-23. Appearance in court by means of closed circuit television.**

(1) When the physical appearance in person in court is required of any person who is represented by counsel and held in a place of custody or confinement operated by the state or any of its political subdivisions, upon waiver of any right such person may have to be physically present, such personal appearance may be made by means of closed circuit television from the place of custody or confinement, provided that such television facilities provide two-way audio-visual communication between the court and the place of custody or confinement and that a full record of such proceedings be made by split-screen imaging and recording of the proceedings in the courtroom and the place of confinement or custody in addition to such other record as may be required, in the following proceedings:

- (a) Initial appearance before a judge on a criminal complaint;
- (b) Waiver of preliminary hearing;
- (c) Arraignment on an information or indictment where a plea of not guilty is entered;
- (d) Arraignment on an information or indictment where a plea of guilty is entered;
- (e) Any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses;
- (f) Sentencing after conviction at trial;
- (g) Sentencing after entry of a plea of guilty; and
- (h) Any civil proceeding other than trial by jury.

(2) This section shall not prohibit other appearances via closed circuit television upon waiver of any right such person held in custody or confinement might have to be physically present.

(3) Nothing contained in this section shall be construed as establishing a right for any person held in custody to appear on television or as requiring that a place of custody shall provide a two-way audio-visual communication system.

**SOURCES:** Laws, 2001, ch. 316, § 1, eff from and after July 1, 2001.

**Cross References** — Bail taken in open court, see § 99-5-3.

Pretrial proceedings, generally, see §§ 99-15-1 et seq.

Arraignment and entry of guilty pleas, see § 99-15-25.

Post-conviction proceeding — time for hearing and return to Department of Corrections, see § 99-19-42.

Post-conviction proceedings, generally, see §§ 99-39-1 et seq.

## ATTORNEY GENERAL OPINIONS

Lunacy hearings fall under the provisions of this section and the chancery court would be allowed to conduct hearings via closed circuit television provided that the attorney representing the respondent waived the personal appearance rights of the respondent. An attorney could waive physical presence and choose to represent his client from either the courthouse or from the place of custody or confinement during a closed circuit televi-

sion hearing. Alfonso, Aug. 29, 2003, A.G. Op. 03-0384.

A defendant must be represented by counsel in order to waive physical personal appearance and appear via closed circuit television. However, the attorney could choose to represent his client from either the courthouse or the place of custody or confinement during the closed circuit television hearing. Aldridge, Oct. 10, 2003, A.G. Op. 03-0545.

**§ 99-1-25. Entrapment; affirmative defense to criminal prosecution; burden of proof.**

(1) It is an affirmative defense to a criminal charge that the person was entrapped. To claim entrapment, the person must admit by the person's testimony or other evidence the substantial elements of the offense charged.

(2) A person who asserts an entrapment defense has the burden of proving each of the following by clear and convincing evidence:

(a) The idea of committing the offense was initiated by law enforcement officers or their agents rather than by the person.

(b) The law enforcement officers or their agents urged and induced the person to commit the offense.

(c) The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

(3) A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity, nor is it entrapment for law enforcement officers or their agents to supply, furnish or sell contraband to an individual where:

(a) There is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) The issue of entrapment shall be tried by the trier of fact. The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment.

**SOURCES:** Laws, 2005, ch. 463, § 7, eff from and after July 1, 2005.

## CHAPTER 3

### Arrests

#### SEC.

- 99-3-1. Who may make arrests.
- 99-3-2. Authorization for federal law enforcement officers to make arrests.
- 99-3-3. Time or place.
- 99-3-5. All persons must aid arresting officer when commanded.
- 99-3-7. When arrests may be made without warrant.
- 99-3-9. Arrest of defendants in presence of court without process.
- 99-3-11. Arresting officer or person may break into house.
- 99-3-13. Officer may pursue and apprehend offender any place in state; jailing prisoner for safekeeping.
- 99-3-15. Escaped offender may be pursued and retaken without warrant.
- 99-3-17. Offender must be taken before proper officer without delay.
- 99-3-18. Post-arrest release on written notice to appear at later date.
- 99-3-19. Warrant good across county line.
- 99-3-21. Justice of the peace may issue warrant for offender coming into his jurisdiction.
- 99-3-23. No liability for legal arrest.
- 99-3-25. Duty of officers to arrest gamblers, bucket-shop operators and futures dealers.
- 99-3-27. Tramps; arrest by any person; proceedings.
- 99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.
- 99-3-29. Perjury; court may commit wilful perjurer to prison immediately.
- 99-3-31. Perjury; witnesses to be bound over for grand jury and trial.
- 99-3-33. Perjury; court may detain documents.
- 99-3-35. Reward for arrest and delivery of fleeing killer.
- 99-3-37. Reward for arrest and delivery of fleeing killer; sheriff and other officers may receive.
- 99-3-39. Rewards for information may be offered by counties and municipalities.

#### § 99-3-1. Who may make arrests.

(1) Arrests for crimes and offenses may be made by the sheriff or his deputy or by any constable or conservator of the peace within his county, or by any marshal or policeman of a city, town or village within the same, or by any United States Marshal or Deputy United States Marshal, or, when in cooperation with local law enforcement officers, by any other federal law enforcement officer who is employed by the United States government, authorized to effect an arrest for a violation of the United States Code, and authorized to carry a firearm in the performance of his duties. Private persons may also make arrests.

(2)(a) Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant if:

- (i) The arrest is authorized or ordered by a judge of the court;



(ii) The person making the arrest has been trained at the Law Enforcement Officers Training Academy established under Section 45-5-1 et seq. or at a course approved by the Board on Law Enforcement Officer Standards and Training; and

(iii) The judge identifies the person making the arrest in his order and a copy of the order is served upon the person being arrested.

(b) For the purposes of the subsection, the term "intensive supervision program" means an intensive supervision program of the Department of Corrections as described in Section 47-5-1001 et seq., of any similar program authorized by a court for offenders who are not under jurisdiction of the Department of Corrections.

**SOURCES:** Codes, 1857, ch. 64, art. 273; 1871, § 2773; 1880, § 3023; 1892, § 1372; Laws, 1906, § 1444; Hemingway's 1917, § 1201; Laws, 1930, § 1224; Laws, 1942, § 2467; Laws, 1987, ch. 390, § 2; Laws, 1993, ch. 547, § 1; Laws, 1995, ch. 604, § 1; Laws, 2000, ch. 555, § 1, eff from and after July 2, 2000.

**Cross References** — Judges as conservators of the peace, see § 9-1-23.

General duties of constables, see § 19-19-5.

Duty of sheriff to keep peace within his county, see § 19-25-67.

Right of railroad police officers to exercise powers of arrest, see § 77-9-505.

Obstructing or resisting arrest, see § 97-9-73.

Time or place of arrest, see § 99-3-3.

## JUDICIAL DECISIONS

### 1. In general.

An arrest made by a sheriff outside his own county is valid only if a similar arrest made by a private person would be lawful. *Davis v. United States*, 409 F.2d 1095 (5th Cir. 1969).

An arrest, within the meaning of the criminal law, is the taking into custody of another person by an officer or a private person for the purpose of holding him to answer to an alleged or suspected crime; and one who voluntarily accompanies an officer to a place where he may be interviewed is not under an arrest. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

Where officers had probable cause to believe that a felony had been committed

and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. *Nash v. State*, 207 So. 2d 104 (Miss. 1968).

Where a private person deputized by a justice of the peace to execute a warrant of arrest issued by him acts under the warrant in making the arrest, he is entitled to the protection afforded a de facto officer in serving a warrant. *Harris v. State*, 72 Miss. 99, 16 So. 360 (1894).

## ATTORNEY GENERAL OPINIONS

Best procedure to follow in most cases where security guard witnesses crime is for guard to file affidavit against perpetrator in municipal or justice court and then if court believes that probable cause exists, court may then issue warrant for

such person's arrest and any law enforcement officer would then be fully authorized to make arrest. Norman, August 4, 1993, A.G. Op. #93-0466.

A municipal police department has concurrent jurisdiction with state security



personnel over criminal over criminal activity that occurs on state-owned property located within the municipal boundaries, but since there is no authority which gives primary jurisdiction to one agency over another, a cooperative effort should be made on the part of all agencies with jurisdiction to evaluate each occurrence of

criminal activity on an individual basis and make a decision as to who should have primary jurisdiction based on the circumstances of the incident and the resources of each investigating agency. Pritchard, January 16, 1998, A.G. Op. #98-0009.

## RESEARCH REFERENCES

**ALR.** False imprisonment: liability of private citizen, calling on police for assistance after disturbance or trespass for false arrest by officer. 21 A.L.R.2d 643.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 A.L.R.3d 700.

Modern status or rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983). 60 A.L.R. Fed. 204.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 1 et seq.

9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

**Lawyers' Edition.** What constitutes probable cause for arrest. 28 L. Ed. 2d 978.

**Practice References.** Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

Robert M. Cipes, Rules of Criminal Procedure (Matthew Bender).

Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson, Neighbors, and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones and Czar, Criminal Practice Handbook, Second Edition (Michie).

Kadish, Brofman, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

Mississippi Penal Code Annotated (Michie).

## § 99-3-2. Authorization for federal law enforcement officers to make arrests.

Any United States Marshal or Deputy United States Marshal is authorized in the performance of his duties to bear arms, to make arrests and to

make searches and seizures. Whenever any other federal law enforcement officer who is employed by the United States government, authorized to effect an arrest for a violation of the United States Code, and authorized to carry a firearm in the performance of his duties is working in cooperation with local law enforcement officers, the agent shall have the authority in the performance of his duties to bear arms, to make arrests and to make searches and seizures. Any right granted under this section in no way relieves the requirements of appropriate affidavit and search warrant from the appropriate jurisdiction and authority pursuant to the laws of this state.

**SOURCES:** Laws, 1987, ch. 390, § 1; Laws, 1993, ch. 547, § 2; Laws, 1995, ch. 604, § 2, eff from and after passage (approved April 7, 1995).

### ATTORNEY GENERAL OPINIONS

This section provides that justice court clerk shall record all affidavits; this section also allows anyone bringing criminal matter in justice court to “lodge the affi-

davit with the judge or clerk”; judge may choose to have clerk acknowledge affidavit. Ferguson, June 9, 1993, A.G. Op. #93-0331.

### RESEARCH REFERENCES

**ALR.** Propriety of search of nonoccupant visitor’s belongings pursuant to warrant issued for another’s premises. 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant’s property or residence authorized by defendant’s minor child—state cases. 51 A.L.R.5th 425.

### § 99-3-3. Time or place.

Arrests for criminal offenses, and to prevent a breach of the peace, or the commission of a crime, may be made at any time or place.

**SOURCES:** Codes, 1857, ch. 64, art. 275; 1871, § 2775; 1880, § 3025; 1892, § 1374; Laws, 1906, § 1446; Hemingway’s 1917, § 1203; Laws, 1930, § 1226; Laws, 1942, § 2469.

### JUDICIAL DECISIONS

#### 1. In general.

An arrest warrant need not be executed at the first available opportunity. *Godbold v. State*, 731 So. 2d 1184 (Miss. 1999).

When a crime had recently been committed in the area and a police officer came upon the defendant and observed that he was wearing a concealed weapon, the officer had no choice but to arrest the defendant or prevent him from using his gun and to prevent a breach of the peace;

and evidence obtained from a search of the defendant was admissible in court. *Chandler v. State*, 272 So. 2d 641 (Miss. 1973).

Peace officers and citizens may at any time arrest persons who are committing crimes in their presence, or to prevent a breach of the peace. *Shinall v. State*, 199 So. 2d 251 (Miss. 1967), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660 (1967), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

## RESEARCH REFERENCES

**Am Jur.** 9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that

police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

### § 99-3-5. All persons must aid arresting officer when commanded.

Every person when commanded to do so by an officer seeking to arrest an offender, must aid and assist in making the arrest, and must obey the commands of the officer in respect thereto.

**SOURCES:** Codes, 1857, ch. 64, art. 274; 1871, § 2774; 1880, § 3024; 1892, § 1373; Laws, 1906, § 1445; Hemingway's 1917, § 1202; Laws, 1930, § 1225; Laws, 1942, § 2468.

**Cross References** — Sheriffs employing power of county in making arrests, see § 19-25-39.

## JUDICIAL DECISIONS

### 1. In general.

Defendant's motion for post-conviction relief (PCR) was time-barred because the defendant did not file his PCR until more than three years later; defendant had three years with full knowledge of the favorable witness in which to move for post-conviction relief, yet he did not do so, and therefore his PCR was not excepted from the time bar on the basis of newly discovered evidence. *Adams v. State*, 954 So. 2d 1051 (Miss. Ct. App. 2007).

A railroad policeman making an arrest of person allegedly stealing coal from his

employer, who called to his assistance a deputy sheriff, was not a bystander within the purview of this section [Code 1942, § 2468], where such railroad policeman was himself in charge of the situation and the deputy sheriff was acting under his direction. *Jefferson v. Yazoo & M.V.R.R. Co.*, 194 Miss. 729, 11 So. 2d 442 (1943).

This section [Code 1942, § 2468] justifies neither the officer nor anyone called on to assist him in unnecessarily killing a person in custody. *Jefferson v. Yazoo & M.V.R.R. Co.*, 194 Miss. 729, 11 So. 2d 442 (1943).

## RESEARCH REFERENCES

**Law Reviews.** Blue, High Noon revisited: commands of assistance by peace

officers in the age of the Fourth Amendment. 101 Yale L. J. 1475, May 1992.

### § 99-3-7. When arrests may be made without warrant.

(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the



accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

(2) Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. In all such cases, the officer making the arrest must inform such person at the time of the arrest the object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable.

(3)(a) Any law enforcement officer shall arrest a person with or without a warrant when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor which is an act of domestic violence or knowingly violated provisions of an ex parte protective order, protective order after hearing or court-approved consent agreement entered by a chancery, county, justice or municipal court pursuant to the Protection from Domestic Abuse Law, Sections 93-21-1 through 93-21-29, Mississippi Code of 1972, or a restraining order entered by a foreign court of competent jurisdiction to protect an applicant from domestic violence as defined by Section 97-3-7 that require such person to absent himself from a particular geographic area, or prohibit such person from being within a specified distance of another person or persons.

(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor which is an act of domestic violence as defined herein, or if two (2) or more persons make complaints to the officer, the officer shall attempt to determine who was the principal aggressor. The term principal aggressor is defined as the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining probable cause.

(c) To determine who is the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors:

- (i) Evidence from the persons involved in the domestic abuse;
- (ii) The history of domestic abuse between the parties, the likelihood of future injury to each person and the intent of the law to protect victims of domestic violence from continuing abuse;
- (iii) Whether one (1) of the persons acted in self-defense; and
- (iv) Evidence from witnesses of the domestic violence.

(d) A law enforcement officer shall not base the decision of whether to arrest on the consent or request of the victim.

(e) A law enforcement officer's determination regarding the existence of probable cause or the lack of probable cause shall not adversely affect the right of any party to independently seek appropriate remedies.

(4)(a) Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may



arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant, provided that the person making the arrest has been trained at the Law Enforcement Officers Training Academy established under Section 45-5-1 et seq. or at a course approved by the Board on Law Enforcement Officer Standards and Training.

(b) For the purposes of this subsection, the term intensive supervision program means an intensive supervision program of the Department of Corrections as described in Section 47-5-1001 et seq., or any similar program authorized by a court for offenders who are not under jurisdiction of the Department of Corrections.

(5) As used in subsection (3) of this section, the phrase misdemeanor which is an act of domestic violence shall mean one or more of the following acts between family or household members who reside together or formerly resided together, current or former spouses, persons who have a current dating relationship, or persons who have a biological or legally adopted child together:

(a) Simple domestic violence within the meaning of Section 97-3-7;

(b) Disturbing the family or public peace within the meaning of Section 97-35-9, 97-35-11, 97-35-13 or 97-35-15; or

(c) Stalking within the meaning of Section 97-3-107.

(6) Any arrest made pursuant to subsection (3) of this section shall be designated as domestic assault or domestic violence on both the arrest docket and the incident report.

(7) A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause and in good faith pursuant to subsection (3) of this section, or failure, in good faith, to make an arrest pursuant to subsection (3) of this section.

**SOURCES:** Codes, 1857, ch. 64, art. 276; 1871, § 2776; 1880, § 3026; 1892, § 1375; Laws, 1906, § 1447; Hemingway's 1917, § 1204; Laws, 1930, § 1227; Laws, 1942, § 2470; Laws, 1968, ch. 355, § 1; Laws, 1988, ch. 571, § 1; Laws, 1989, ch. 330, § 1; Laws, 1989, ch. 364, § 1; Laws, 1995, ch. 328, § 1; Laws, 1996, ch. 483, § 1; Laws, 1999, ch. 504, § 1; Laws, 2000, ch. 554, § 1; Laws, 2000, ch. 555, § 2; Laws, 2002, ch. 510, § 1, eff from and after July 1, 2002.

**Joint Legislative Committee Note** — Section 1 of ch. 554, Laws, 2000, effective from and after July 1, 2000, amended this section. Section 2 of ch. 555, Laws, 2000, effective from and after July 2, 2000, also amended this section. As set out above, this section reflects the language of Section 2 of ch. 555, Laws, 2000, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section taking effect earlier.

**Cross References** — Search and Seizure, see U.S. Const., Amend. IV; Miss. Const., Art. 3, § 23.

Authorization of law enforcement officer dispatched to educational institute to arrest upon probable cause, see § 37-11-29.

Immunity of a law enforcement officer for an arrest, or failure to make an arrest, pursuant to this section, see § 93-21-27.

Who may make arrests, see § 99-3-1.

Domestic violence, bail restrictions, see § 99-5-37.

Inapplicability of Mississippi Rules of Evidence to probable cause hearings in criminal cases, see Miss. R. Evid. 1101.

## JUDICIAL DECISIONS

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### 1. In general.

Even if the town police officers owed a duty to the murder victim under Miss. Code Ann. § 99-3-7(3)(a), Miss. Code Ann. § 93-21-27 specifically provided immunity to the officers. *Fair v. Town of Friars Point*, 930 So. 2d 467 (Miss. Ct. App. 2006).

Deputy could lawfully arrest defendant without a warrant pursuant to Miss. Code Ann. § 99-3-7 where the deputy personally observed the property damage and defendant's vehicle, and he gathered a statement from the homeowner; additionally, defendant admitted to the deputy that he hit the mailbox, such that the presence requirement of § 99-3-7 was satisfied. *Spencer v. State*, 908 So. 2d 783 (Miss. Ct. App. 2005).

Where the victim was shot by her estranged husband after an arrest warrant was issued, but never delivered to the sheriff's department, there was ample probable cause to arrest through Miss. Code Ann. § 99-3-7(3), based upon Miss. Code Ann. § 97-35-15. However, reckless disregard required that the person knowingly or intentionally commit a wrongful act and even viewing the facts in a light most favorable to the victim, the victim showed no evidence that the sheriff's de-

partment knew that it could and/or was required to arrest the victim's estranged husband; the sheriff's department's conduct, even if negligent, could not be said to have risen to the level of reckless disregard, and therefore, Miss. Code Ann. § 11-46-9(c) did provide immunity based upon the sheriff's department's conduct, and summary judgment was proper as to the sheriff's department. *Collins v. Tallahatchie County*, 876 So. 2d 284 (Miss. 2004).

A police officer's statement that he had a warrant for defendant's arrest did not invalidate the arrest, even though the arrest warrant was not valid, where the officer had knowledge of facts sufficient to constitute probable cause for a warrantless arrest pursuant to this section. *Lanier v. State*, 450 So. 2d 69 (Miss. 1984).

There was sufficient compliance with this section when the arresting officer informed defendant that he was being arrested for larceny and gave him a copy of the arrest warrant as soon as they had reached the jail. *Wilcher v. State*, 448 So. 2d 927 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984), habeas corpus conditionally granted, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

A warrantless arrest of an occupant of an automobile who matched the description of the person who robbed a motel 45 minutes before was made with probable cause and was valid under this section where the officers told the occupant that he was under arrest for investigation. *Johnson v. State*, 347 So. 2d 358 (Miss. 1977).

A policeman had authority to make a warrantless arrest of defendant where, though defendant contended he was being followed by police because of a report that defendant had assaulted someone earlier in the day, evidence supported the policemen's contention that they were following

him to take him into custody for reckless driving after observing him driving at an excessive speed, spinning his wheels, and fishtailing. *Kinney v. State*, 336 So. 2d 493 (Miss. 1976).

Where a police officer was pursuing the defendant in an effort to arrest him for an offense committed in the officer's presence, the officer was not required to inform the defendant of the object and cause of the arrest. *Watts v. State*, 305 So. 2d 348 (Miss. 1974).

Where there was an outstanding warrant for the arrest of defendant at the time of the arrest, and the arresting officer knew of its existence, the failure of the arresting officer to provide the warrant for defendant's arrest on a misdemeanor charge did not entitle defendant to resist arrest. *Torrence v. State*, 283 So. 2d 595 (Miss. 1973).

A sheriff had no right to arrest the defendant unless it was evident to him at the time that some breach of the peace was being threatened or a crime was being committed in his presence. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

An arrest begins when the officer begins his pursuit for the purpose of making it, and if he does not have the authority to make an arrest for possession of whisky at the instant he begins his pursuit of an automobile for that purpose, the fact that the person the officer is pursuing violates a traffic law in making his escape does not thereby authorize the arrest which began unlawfully. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

An arrest without a warrant, otherwise legal, is not rendered illegal by the failure of the arresting officer to inform the person arrested of the object and cause of his arrest. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

Pursuit and arrest without a warrant is not rendered permissible by the fact that a motorist on seeing the sheriff in a car alongside, drove away as rapidly as possible, incidentally violating traffic laws. *Smith v. State*, 240 Miss. 738, 128 So. 2d 857 (1961).

The legislature by this section [Code 1942, § 2470] extended the common-law authority of officers to make arrests without a warrant to indictable offenses committed or attempted in the presence of an officer whether or not a breach of the peace was involved. *Smith v. State*, 228 Miss. 476, 87 So. 2d 917, 58 A.L.R.2d 1052 (1956).

Where there was a violation of the law in operation of movie theater on a Sunday after 6 p.m., the police officers, in whose presence the law was violated, were authorized to make multiple arrests without warrants. *Paramount-Richards Theatres v. City of Hattiesburg*, 210 Miss. 271, 49 So. 2d 574 (1950).

A sheriff entering one's private backyard and, upon smelling liquor, arrested the owner for possession of intoxicating liquor, was a trespasser, and the arrest was illegal where the sheriff had no warrant. *Hartfield v. State*, 209 Miss. 787, 48 So. 2d 507 (1950).

To justify officer's arrest of person without warrant for commission of misdemeanor in his presence, there must presently exist, independently of confession, essential facts to the knowledge of person making arrest which constitute corpus delicti. *Harris v. State*, 209 Miss. 183, 46 So. 2d 194 (1950).

Finding of liquor in purse on rear seat of car by officer making search of automobile under search warrant does not authorize officer to arrest husband of owner of purse for unlawful possession of liquor without warrant, and arrest cannot be vindicated by finding, after arrest, of liquor in possession of defendant husband. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

Finding of liquor in purse on rear seat of car, belonging to woman in car, by officer making search of automobile under search warrant does not authorize officer to arrest without warrant former passenger who has left car and entered his own place of business, and subsequent search of passenger's person is unlawful. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

Arrest without warrant for illegal possession of intoxicating liquor was lawful where the officer smelled whiskey on the accused and saw a bottle in his pocket, even though the whiskey in the bottle was



not visible until after the arrest. *Copeland v. State*, 202 Miss. 58, 30 So. 2d 509 (1947).

Deputy sheriffs had no right to arrest without warrant man approaching illicit still, unless they had reasonable ground to suspect and believe that he owned or was operating still and informed him of object and cause of arrest. *Hinton v. Sims*, 171 Miss. 741, 158 So. 141 (1934), error overruled, 171 Miss. 741, 158 So. 778 (1935).

Generally, officer seeking to arrest another without warrant should tell latter to consider himself under arrest, though not required to inform him of object and cause of arrest until after it is made. *Hinton v. Sims*, 171 Miss. 741, 158 So. 141 (1934), error overruled, 171 Miss. 741, 158 So. 778 (1935).

Deputy sheriff's attempted arrest without warrant of man approaching illicit still by commanding him to raise hands, instead of telling him to consider himself under arrest, held illegal. *Hinton v. Sims*, 171 Miss. 741, 158 So. 141 (1934), error overruled, 171 Miss. 741, 158 So. 778 (1935).

One whom deputy sheriffs illegally attempted to arrest without warrant by commanding him to raise his hands, instead of telling him to consider himself under arrest, had right to resist officers with force necessary to meet force. *Hinton v. Sims*, 171 Miss. 741, 158 So. 141 (1934), error overruled, 171 Miss. 741, 158 So. 778 (1935).

A person who before arrest states that certain kegs in his automobile contained whisky may be arrested without warrant and the officer may seize the intoxicating liquor without warrant for a crime committed in his presence. *Williamson v. State*, 140 Miss. 841, 105 So. 479 (1925).

## 2. Felony.

Arrest is valid if arresting officer has probable cause to believe that felony has been committed and probable cause to believe that suspect to be arrested committed the felony; probable cause means less than evidence which would justify condemnation but more than bare suspicion. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A warrant is not necessary for an arrest when a felony has been committed and there is reasonable ground to believe the one arrested committed the crime. *McEwen v. State*, 224 So. 2d 206 (Miss. 1969).

If a person has committed a felony though not in the presence of the officer, an officer may arrest him without warrant, or may make arrest of felons where he has reasonable grounds to believe that the person to be arrested has committed a felony. *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925).

Officer having knowledge or probable grounds for believing that felony is being committed may go on premises without warrant for arrest, and without search warrant, and arrest for felony. *Pickett v. State*, 139 Miss. 529, 104 So. 358 (1925).

## 3. Misdemeanor.

The defendant was properly arrested for possession of alcohol in a dry county, notwithstanding the absence of any breach of peace threatened or attempted in the presence of the arresting officer; the officer approached the vehicle in which the defendant was seated in good faith and in response to a reported domestic disturbance call. *Northington v. State*, 749 So. 2d 1099 (Miss. Ct. App. 1999).

The misdemeanor offenses of reckless driving and driving under the influence of intoxicating liquor were both committed in the presence of a police officer within the meaning of this section, even though he did not observe the defendant driving, and thus rendered the defendant's arrest legal, where the officer observed an accident upon arriving at the scene, the position of the vehicles, the damage to each, an ambulance, attendants attempting to revive one of the victims, the defendant sitting under a steering wheel, the strong odor of alcohol on defendant's breath, the defendant's slurred speech, and his unsteadiness on his feet; accordingly, results of a blood test administered after defendant's arrest were properly admitted into evidence, particularly where the officer learned that the victim was dead prior to administering the test, whereupon he had the right to detain defendant on the felony charge of culpably negligent homicide. *Williams v. State*, 434 So. 2d 1340 (Miss.



1983), but see *Fisher v. Eupora*, 587 So. 2d 878 (Miss. 1991).

An officer making an arrest for a misdemeanor not committed in his presence must have the warrant for such arrest in his actual possession if the arrest is to be lawful. *Butler v. State*, 212 So. 2d 573 (Miss. 1968).

An officer making an arrest for a misdemeanor not committed in his presence must have the warrant of arrest in his actual possession if the arrest is to be lawful, and he must show it to the accused if requested to do so. *Smith v. State*, 208 So. 2d 746 (Miss. 1968).

An officer who has in good faith stopped an automobile to check the operator's license, may make an arrest for a misdemeanor committed in his presence, such as the carrying of a concealed weapon, discovered while searching the car. *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

The arrest for misdemeanors committed or attempted in the presence of officers must be made as quickly after the commission of the offense as the circumstances will permit. *Smith v. State*, 228 Miss. 476, 87 So. 2d 917, 58 A.L.R.2d 1052 (1956).

Officer has right to make an arrest without warrant for the commission of misdemeanor in his presence, and misdemeanor is being committed in presence of officer when he then and there acquires knowledge thereof through one of his senses. *Thomas v. State*, 208 Miss. 264, 44 So. 2d 403 (1950).

Officer is authorized to arrest defendant for unlawful possession of liquor without warrant only if misdemeanor is being knowingly committed in his presence. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

As regards arrest without warrant, a misdemeanor is being committed in the presence of an officer when he then and there acquires knowledge thereof through one of his senses or inferences properly to be drawn from the testimony of the senses. *Copeland v. State*, 202 Miss. 58, 30 So. 2d 509 (1947).

#### 4. Fresh pursuit.

Where a felony is committed at night and, being discovered the next morning, an officer and others immediately followed

and shortly coming upon the felon in hiding he flees and is followed, this is a fresh pursuit within the meaning of the section [Code 1942, § 2470] and a warrant for the arrest is not necessary. *White v. State*, 70 Miss. 253, 11 So. 632 (1892).

#### 5. Right to fix bail.

This section [Code 1942, § 2470], coupled with the right of a sheriff to place in jail a person arrested, necessarily implies that a sheriff has the right to fix the amount of bail of a person arrested without a warrant for an indictable offense committed in his presence and to determine the sufficiency of the bail bond tendered to him, rather than indefinitely to detain the accused in jail pending the availability of a mayor or justice of the peace. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

#### 6. "Presence" requirement.

A conservation officer properly entered private property to arrest the defendants for hunting violations since his personal observations led him to believe that hunting violations were then and there occurring in his presence where he observed an individual in a tree stand (approximately 15 to 20 feet above ground) with a gun but not wearing hunter orange and had information that individuals were hunting over bait on the property. *Corry v. State*, 710 So. 2d 853 (Miss. 1998).

A defendant's arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of § 97-29-47. *Goforth v. City of Ridgeland*, 603 So. 2d 323 (Miss. 1992).

The "presence" requirement of this section had been met and an officer properly arrested the defendant for a misdemeanor crime, where the officer obtained sufficient facts to establish the corpus delicti of a crime and additionally obtained a confession. *Bayse v. State*, 420 So. 2d 1050 (Miss. 1982).

An offense is being committed in the presence of an officer, pursuant to this section, when he acquires knowledge thereof through one of his senses. Where, through the sense of sight, smell, or hearing, an officer receives knowledge that an offense is being committed in his presence, he may arrest the offender without a warrant. Accordingly, where police officers had been monitoring a conversation taking place inside a house and were aware that marijuana was inside the house and that a sale was in progress, a felony was being committed in the presence of officers who were monitoring the conversation and an officer was authorized to arrest the defendant without a warrant. *Moss v. State*, 411 So. 2d 90 (Miss. 1982).

Where through the senses of sight, smell, or hearing, an officer receives knowledge that the offense of carrying a concealed weapon is being committed in his presence, he may arrest the offender without a warrant. *Reed v. State*, 199 So. 2d 803 (Miss. 1967), appeal dismissed, cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273 (1968).

If an officer witnesses a commission of an offense and does not arrest the offender, but departs, on other business, or for other purposes, and afterwards returns, he cannot then arrest the offender without a warrant, for then the reasons for allowing the arrest to be made without a warrant have disappeared. *Smith v. State*, 228 Miss. 476, 87 So. 2d 917, 58 A.L.R.2d 1052 (1956).

## 7. Probable cause, generally.

In defendant's auto burglary case, an officer had probable cause for a warrantless arrest of defendant because the arresting officer testified that he was aware that there had been an attempted vehicle burglary nearby, and when the individual seen inside the car did not respond to the officer's two requests to exit the vehicle, the officer had probable cause to break the car window and detain the individual; the fact that defendant physically resisted the officer's lawful requests, after reasonable suspicion was established, furthered the establishment of probable cause to arrest him. *Qualls v. State*, 947 So. 2d 365 (Miss. Ct. App. 2007).

Defendant's warrantless arrest for murder by Tennessee police was supported by probable cause: he left Mississippi by bus on the day of the murder, the man who drove him to the bus station implicated himself in the crime, a bloody palm print at the crime scene suggested that the killer cut his right hand, and Tennessee police confirmed that defendant had an injured hand. *Jones v. State*, 841 So. 2d 115 (Miss. 2003).

Where a defendant was arrested without a warrant in Tennessee for a murder committed in Mississippi, the Tennessee police were entitled to rely on information Mississippi police relayed to them which established probable cause for the arrest. *Jones v. State*, 841 So. 2d 115 (Miss. 2003).

Existence of probable cause or reasonable grounds justifying arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Failure to inform the accused of the object and cause of his arrest, as required under this section, merely shifts the burden of proving probable cause to the state. *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977).

Where the sheriff was present with the chief of police and the affiant, and personally observed the making of the affidavit and the issuance of an arrest warrant, after which the chief of police and the sheriff went in opposite directions with the chief of police taking the warrant, and the sheriff arrested the defendant and informed him of the cause of his arrest, the state was not obliged to prove probable cause with respect to the arrest. *Johnson v. State*, 260 So. 2d 436 (Miss. 1972).

Probable cause to make an arrest means less evidence than would justify condemnation, but more than bare suspicion. *Powe v. State*, 235 So. 2d 920 (Miss. 1970).

Where an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent man, under the circumstances, to believe likewise, he



has such probable cause as will justify him for arresting without a warrant. *Canning v. State*, 226 So. 2d 747 (Miss. 1969), overruled on other grounds, *White v. State*, 571 So. 2d 956 (Miss. 1990).

Probable cause for the arrest of an accused without a warrant is a judicial question, and the arresting officer is not the final judge of whether he has sufficient information on which to base his actions in making an arrest. *Canning v. State*, 226 So. 2d 747 (Miss. 1969), overruled on other grounds, *White v. State*, 571 So. 2d 956 (Miss. 1990).

A police officer is not the final judge as to whether he had probable cause to make an arrest. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

An officer without a warrant may arrest a person when he has reasonable cause to believe that a felony has been committed, and reasonable cause to believe that such person committed it. *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968).

Objection that arrest was not upon probable cause is waived by failure to raise it at the trial. *Gordon v. State*, 160 So. 2d 73 (Miss. 1964).

Probable cause for an arrest exists where the arresting officer has official information that a criminal charge has been placed against the person arrested, and has recognized him from a photograph. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

It is not enough that there is a good ground to believe that a felony has been committed, but the ground for the belief must include also as an element essential to the right to arrest that the party to be arrested is the person guilty of felony, and without the second element, the first had as well not exist, and it is not enough that there was good ground to believe that the person proposed to be arrested was present at the time the felony was committed. *Branning v. State*, 215 Miss. 223, 60 So. 2d 633 (1952).

In an action for alleged unlawful assault and battery and unlawful arrest and imprisonment where it was shown that

the officers had no warrant, but there was factual issue as to whether plaintiff when arrested was engaged in the actual commission of an offense in the presence of these officers, it was a question for the jury as to whether the officers had authority to make the arrest. *State ex rel. Smith v. Broom*, 58 So. 2d 32 (Miss. 1952).

This statute is declaratory of the common law and under it there must be probable cause to believe that a felony has been committed, and that the person to be arrested is the guilty party. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414 (1947).

Under this section [Code 1942, § 2470], it is not enough that there is good ground to believe that a felony has been committed, but the ground for the belief must include also as an element essential to the right to arrest that the party to be arrested is the party guilty of the felony. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414 (1947).

An arrest without warrant cannot be made on the belief that the person proposed to be arrested was present at the time that a felony was committed. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414 (1947).

#### **8. —Information obtained from informant.**

Sheriff who arrested defendant, on the basis of information furnished by a person who, by giving the information, implicated his brother as well as the defendant, acted with probable cause. *Moore v. State*, 493 So. 2d 1295 (Miss. 1986).

Information obtained from an anonymous telephone informer that the defendant would be transporting whisky in a certain automobile at a certain place and time does not constitute probable cause for the search of the defendant's automobile and the seizure of liquor found there. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

#### **9. —Information obtained from radio broadcast.**

Incriminating oral statements given by defendant's brother and brother-in-law, which placed defendant at the scene of the crime, and a police radio report that there was a warrant for his arrest, furnished police officers with probable cause to ar-

rest defendant. *Kelly v. State*, 493 So. 2d 356 (Miss. 1986).

In a prosecution for armed robbery, the defendant's arrest was lawful where one of the arresting officers testified that he had received information on his police radio that there was a warrant for the defendant's arrest and where this official information was presumed to be authentic and was sufficient to constitute probable cause for the arrest of the defendant by officers without the warrant being in their possession. *Anderson v. State*, 397 So. 2d 81 (Miss. 1981).

Probable cause for arrest was lacking where the arrest was made on the basis of information given on a police radio bulletin describing the defendant and another person, the automobile which they were probably driving, and items allegedly stolen from a building, but which information was in turn based on an uncorroborated tip from an informer. *Whiteley v. Warden, Wyo. State Penitentiary*, 58 Ohio Op. 2d 434, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), overruled on other grounds, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

A radio dispatch from the highway safety patrol which described the getaway vehicle used in a robbery, supplied the arresting officer with probable cause to pursue the described automobile and to arrest its occupants, one of whom was the defendant. *Norwood v. State*, 258 So. 2d 756 (Miss. 1972).

#### 10. —In particular situations.

Based on a description of a car, an officer's recognition of defendant from a bank videotape, and a description of persons who had committed several violent crimes, an officer's decision to stop a vehicle and arrest the occupants was valid under Miss. Code Ann. § 99-3-7. *Perkins v. State*, 863 So. 2d 47 (Miss. 2003).

Defendant's warrantless arrest for murder by Tennessee police was supported by probable cause: he left Mississippi by bus on the day of the murder, the man who drove him to the bus station implicated himself in the crime, a bloody palm print at the crime scene suggested that the killer cut his right hand, and Tennessee police confirmed that defendant had an

injured hand. *Jones v. State*, 841 So. 2d 115 (Miss. 2003).

Where a defendant was arrested without a warrant in Tennessee for a murder committed in Mississippi, the Tennessee police were entitled to rely on information Mississippi police relayed to them which established probable cause for the arrest. *Jones v. State*, 841 So. 2d 115 (Miss. 2003).

Police officer properly relied on computer report that indicated defendant's driver's license had been suspended and an information provided in a be-on-the-lookout-for-defendant order to make an initial detention in an investigatory traffic stop and subsequent arrest of defendant. *Hodge v. State*, 801 So. 2d 762 (Miss. Ct. App. 2001).

Probable cause existed for the arrest of the defendant where (1) the body of a young child was found by the police, (2) the autopsy showed that she had been assaulted by a man, and (3) the defendant babysat her the night before and was the last person to see her before she disappeared. *Brewer v. State*, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

Officers had probable cause to arrest defendant based on facts that they were investigating a bloody murder, person wearing red shirt and dark pants had been seen leaving the crime scene, defendant had been wearing an orange shirt and black shorts on the night of the murder, defendant was seen covered in blood and carrying a baseball bat, and victim had been hit with an object of some sort, and absence of corroboration of defendant's claim that he had been in a fight. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A sheriff had probable cause to arrest a defendant for capital murder and armed robbery without a warrant where the sheriff had information from two informants implicating the defendant and his codefendant, the sheriff knew from past experience that one of the informants was very reliable, and the informants accurately identified the codefendant as the "trigger man" which suggested some basis of knowledge and further reliability. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).



There was sufficient probable cause to arrest a defendant for distribution of a controlled substance to an undercover informant, even though none of the arresting officers actually saw the drug transaction occur, where the conversation between the defendant and the undercover informant was being monitored by the officers during the transaction, the officers testified that they had surrounded the building in their cars to monitor the entrance and exit of anyone on the premises, the undercover informant gave the signal, "[t]his is good stuff" in order to alert the officers that the crime had occurred, and there was no one other than the defendant in close proximity to the informant when the officers arrived. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

A sheriff properly made a warrantless arrest and seizure of evidence from defendant, where the sheriff arrested defendant only after observing him drinking beer, weaving somewhat and having slurred speech. *Bryant v. State*, 427 So. 2d 131 (Miss. 1983).

In a prosecution for burglary, the trial court properly denied a motion to suppress evidence seized after defendant's warrantless arrest where probable cause for the arrest was established by the high crime area where the arrest took place, the early morning hour, the sound of breaking glass, the furtive actions of defendant (flight, disposal of a bag he was carrying, dubious explanation for his presence at the scene), the defendant's nervousness, and the absence of others in the area. *Smith v. State*, 386 So. 2d 1117 (Miss. 1980).

A police officer had probable cause to arrest a suspected rapist at the conclusion of a police-monitored telephone call to the victim five months following the rape, where police units were directed by radio to begin checking pay phones in a certain area and to be on the lookout for a man of a certain description, and where the officer observed defendant, who met the approximate description of the attacker, hanging up a pay phone at the same time he was being radioed that the caller was hanging up or about to hang up. *Covan v. State*, 374 So. 2d 833 (Miss. 1979).

Where state police officer knew before the arrest that postal money orders had

been stolen, that they were made out in a certain sum, that sum bore a certain name, that at least two and possibly three persons were involved, that they were driving a certain automobile, and he had a description of two of the suspects from a FBI wanted bulletin, he had a full description of the suspects from a motel operator, and he knew that an attempt had been made to pass one of the stolen money orders just 10 minutes before he came upon the suspected vehicle and passengers at another motel, and by his own eyes he knew that the vehicle, its passengers, and the man registering at the desk fit the given description, probable cause to arrest existed. *United States v. Lyles*, 488 F.2d 290 (5th Cir. 1974), cert. denied, 419 U.S. 851, 95 S. Ct. 92, 42 L. Ed. 2d 82 (1974).

Where there was no doubt that a crime had been committed, and defendant had been seen by numerous witnesses about the time the crime was committed near where footprints were found on an embankment going to the victim's house, there existed probable cause of his arrest. *Evans v. State*, 275 So. 2d 83 (Miss. 1973), but see *Hall v. State*, 427 So. 2d 957 (Miss. 1983).

When a police officer observed that the defendant was wearing a concealed weapon it was his duty to arrest the defendant who was obviously committing a misdemeanor in his presence. *Chandler v. State*, 272 So. 2d 641 (Miss. 1973).

Where an officer knew that the defendant had committed a misdemeanor and had also run up a large bill at a motel under a fictitious name, it was more likely that the defendant had committed the felony of false pretenses; Thus there was probable cause to arrest, based upon the misdemeanor charge. *United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971), cert. denied, 406 U.S. 923, 92 S. Ct. 1790, 32 L. Ed. 2d 123 (1972).

Where police officers knew that a rape had been committed, and had a description of the assailant's physical characteristics and clothing, which matched the appearance of the defendant and the clothing he was wearing, and where they observed that there was blood on the defendant's trousers, and that his elbow had been skinned, the officers had ample prob-

able cause to arrest the defendant without a warrant. *Baylor v. State*, 246 So. 2d 516 (Miss. 1971).

Where immediately after the robbery of a store, persons were seen running from the direction of the store and then fleeing in a white automobile with California license plates, and the automobile appeared to have a burned place on the side, and shortly thereafter an automobile of such description was stopped at a highway patrol roadblock, the occupants of the automobile were lawfully arrested on ample probable cause. *Dorsey v. State*, 243 So. 2d 550 (Miss. 1971).

Police officers who visited the scene of a burglary, received a description of a suspect, discovered an out-of-state automobile parked at the rear of the premises and later observed the defendant running from the wooded area at the rear of the burglarized premises, stop in some bushes, and then run toward the automobile, had probable cause to arrest the defendant whose appearance corresponded to the description which the officers had. *Powe v. State*, 235 So. 2d 920 (Miss. 1970).

Where a police officer observed the defendant's automobile making an illegal turn, and watched it as it proceeded in an erratic manner, crossing the center line and running off the pavement at times, and where, after stopping the automobile, the officer detected an odor of intoxicating liquor about the defendant, and noted that the defendant's speech was impaired, the officer acted lawfully in stopping the automobile and arresting the defendant for making an illegal turn and for driving while under the influence of intoxicating liquor. *Hogan v. State*, 235 So. 2d 704 (Miss. 1970), cert. denied, 401 U.S. 977, 91 S. Ct. 1204, 28 L. Ed. 2d 327 (1971).

Where an arresting officer knew that the robbery of a music store was committed by at least three Negro men, knew that a Negro man riding in an automobile of a given description had a few days previously acted so suspiciously at the store that the police were notified, and knew that a car of a given description had been operating in the area with a stolen license tag and that in the robbery a large number of coins had been stolen from the

store, the officer had probable cause to stop an automobile answering the given description which he observed "riding low", as though weighted down in the rear, some three hours after the robbery, and to arrest four male Negro occupants. *Bogard v. State*, 233 So. 2d 102 (Miss. 1970).

Police officers, who were informed by a motel manager that the defendant had registered at the motel under the name of a certain person and had paid his bill with a credit card issued to that person and that upon phoning the issuer of the card the manager had been informed that the card was one reported stolen, and who found the defendant in the room registered in the name of that person, had reasonable ground under Mississippi law to believe that a forgery had been committed in connection with the use of a stolen credit card and that the defendant had committed it, so that they could lawfully arrest the defendant without a warrant. *United States v. Lowery*, 436 F.2d 1171 (5th Cir. 1970), cert. denied, 401 U.S. 978, 91 S. Ct. 1208, 28 L. Ed. 2d 329 (1971).

After the defendant had confessed to an indictable offense, the interrogating officer had sufficient grounds upon which to arrest him and thereafter to take the picture and fingerprints of the defendant. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

Where the arresting officer had been informed by one of the participants in a drugstore robbery of the identity and whereabouts of the defendant and the remainder of the stolen goods and drugs, the officer had reasonable ground to suspect and believe that the defendant had committed the felony of illegal possession of narcotic drugs and, not only had the right to arrest the defendant but also to search his motel room as an incident of the arrest. *Meeks v. Hughes*, 228 So. 2d 582 (Miss. 1969).

The presence of narcotics in bottles which the defendant dropped when confronted by officers conducting an investigation of the burglary of a drugstore, provided the officers with probable cause to arrest the defendant. *Branning v. State*, 222 So. 2d 667 (Miss. 1969).

When the sheriff of Forrest County discovered that the defendant was aiding a



felon to escape, he had "reasonable cause" and sufficient grounds to believe that the defendant had taken the fleeing felon out of Forrest County knowing that he was a fleeing felon, and, as a private person, the sheriff had a right to arrest the defendant in Stone County on probable cause. *Brown v. State*, 217 So. 2d 521 (Miss. 1969).

State police officers' knowledge that defendant had offered a used pickup truck for which he possessed no evidence of title to a dealer at a ridiculously low price constituted probable cause, and supported their arrest of the defendant without a warrant when they spotted him driving a vehicle whose description corresponded to that of the truck he had previously offered for sale. *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968).

A police officer, reliably informed that a felony had occurred and provided with a description of the automobile observed at the scene of the crime had probable cause to stop a vehicle answering the general description and to arrest its occupants without a warrant; and the examination of the operator's license of the driver did not constitute a pretext for stopping the car but was a natural incident to the arrest. *McCullum v. State*, 197 So. 2d 252 (Miss. 1967).

Sheriff's search of defendant's premises was not unreasonable and he could have arrested the defendant without a warrant had he been at home, and his testimony in homicide prosecution as to what he found at the scene of the crime on defendant's premises without a search warrant was properly admitted, where deceased's body was found by the road side and sheriff followed trail from body to the home of accused where he discovered that the yard had recently been thoroughly cleaned, blood near the front steps covered with ashes, a smouldering fire in the back yard wherein many things, including clothes, had been burned, and blood stained blocks of wood hidden in a hollow tree, since the sheriff had probable cause to believe that a felony had been committed. *Leflore v. State*, 197 Miss. 337, 22 So. 2d 368 (1945).

Firing into house in nighttime with knowledge that house was occupied and that persons were sleeping therein was done in commission of act evincing a reck-

less disregard for human life, and with intent to injure some person therein, and town marshal living in house had such probable cause to believe that person firing gun had committed felony as would warrant marshal in arresting person without warrant. *Lee v. State*, 179 Miss. 122, 174 So. 85 (1937).

Evidence that defendant checked out of hotel on night of burglary and had driven about town late at night, and had applied to physician for narcotics, showed probable cause for arrest without warrant for burglarizing drug store. *Millette v. State*, 167 Miss. 172, 148 So. 788 (1933).

#### 11. —Lacking in particular situations.

The defendant's arrest was illegal where the only information upon which the arresting officer acted was that a young child was missing and that the defendant babysat the child the night before; however, the improper admission of evidence recovered after the arrest was harmless as such evidence added absolutely nothing inculpatory to the case. *Brewer v. State*, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

In a prosecution for burglary of a courthouse, the arresting officer was without reasonable grounds to "suspect and believe" that defendant had committed the "felony", as required by this section, where a third party was taken into custody after a second officer heard strange noises coming from a vacant home next to the courthouse, the second officer managed to effect an arrest of one of two men seen at the house, the first officer knew that a large sum of cash was found on the person of the third party arrested at the house, the first officer subsequently returned to the area of the abandoned house where he observed defendant lawfully driving at a point about 100 yards from where the arrest of the third party had occurred, and such officer then arrested defendant without any knowledge that the courthouse had been burglarized. *Rome v. State*, 348 So. 2d 1026 (Miss. 1977).

Where probable cause for arrest terminated when a gun barrel was measured and found to be lawful, the subsequent discovery of contraband drugs on the arrested person was the result of an illegal

search and it would not be retroactive to strengthen in any way the factors indicative of probable cause existing at the time of the arrest, and the drugs were not admissible in evidence. *Carroll v. Carroll*, 277 So. 2d 435 (Miss. 1973).

The fact that the sheriff looked through the window of an automobile and observed unconcealed ordinary tools lying on the back seat and the floor board did not constitute the crime of possession of burglary tools and did not constitute probable cause for the search and seizure of the automobile and the arrest of the defendant and his companions. *Pamphlet v. State*, 271 So. 2d 403 (Miss. 1972).

The fact that a person had been seen in drug store some time prior to the time the store was burglarized did not constitute reasonable ground for believing that he had committed the burglary, so as to authorize the officer to arrest the suspect without warrant and seize narcotics found in possession. *Branning v. State*, 215 Miss. 223, 60 So. 2d 633 (1952).

Where a deputy sheriff, having no probable cause to believe that car was being used in transportation of liquor, and without a search warrant, searched the car, the car owner was entitled to damages. *State, ex rel. Brooks v. Wynn*, 213 Miss. 306, 56 So. 2d 824 (1952).

Arrest without warrant of one on whom could be detected the odor of whiskey, but who was not under the influence of intoxicants, was not justified either because he was boisterous in a cafe or carried a small package of meat under his arm which the arresting officer may have thought contained intoxicating liquor. *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816 (1948).

A sheriff having reliable information that a felony had been committed at a house was not justified in concluding that there was probable cause to believe the Negroes who ran from the house when the sheriff and his posse approached the next morning, because they ran, had participated in the felony. *Hubbard v. State*, 202 Miss. 229, 30 So. 2d 901 (1947).

## 12. Arrest by private person.

Florida procedure whereby person arrested without warrant and charged by information was denied judicial determination of probable cause for pretrial re-

straint was held violative of the Fourth Amendment to the United States Constitution. *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), on remand, 511 F.2d 528 (5th Cir. Fla. 1975).

A private citizen cannot arrest without a warrant for a misdemeanor theretofore committed unless pursuit for the purpose of arrest was begun immediately, since the power to arrest without a warrant for a breach of the peace or other minor offense is given in order to maintain the public peace, and it therefore ceases when the offense is an accomplished fact which can no longer be prevented and public order has been restored. *Protective Life Ins. Co. v. Spears*, 231 So. 2d 510 (Miss. 1970).

Where officers had probable cause to believe that a felony had been committed and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. *Nash v. State*, 207 So. 2d 104 (Miss. 1968).

Statements by several persons present in a poolroom that a certain person was seen, while the one in charge was absent, to go behind the counter where a cashbox was kept, constitute reasonable ground to believe that money found missing was taken by him, so as to give the poolroom proprietor the right to arrest him. *Williams v. Clark*, 236 Miss. 423, 110 So. 2d 365 (1959).

An arrest by the owner of money of one whom he had reasonable cause to believe to have taken it from a cash-box, cannot be justified as an exercise of the statutory right to arrest, where such owner's purpose in seeking the other out was to recover the money, the arrest was made only after he failed to do so, and he did not inform the person arrested of the object and cause of the arrest. *Williams v. Clark*, 236 Miss. 423, 110 So. 2d 365 (1959).

In order to justify an arrest for a misdemeanor, by a private person or an officer, without a warrant, the entire body of the crime must have taken place in the presence, or the hearing and presence, of such private person or officer; a necessary element of the crime cannot be supplied either by the confession of the accused or



by information from an outside source. *Walker v. State*, 188 Miss. 177, 189 So. 804 (1939).

A statute authorizing a private person to arrest without a warrant a person who has committed a felony, though not in his presence, requires person to have probable cause to believe that a felony has been committed and that person arrested is guilty one. *Howell v. Viener*, 179 Miss. 872, 176 So. 731 (1937).

### 13. Admissibility of evidence.

Defendant's conviction for the burglary of a dwelling was proper where the trial judge did not abuse his discretion in admitting the testimony of the deputy about his conversation with or questioning of defendant prior to the arrest because defendant was not under arrest at the time he was initially questioned by the deputy. *Henderson v. State*, 853 So. 2d 141 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

The defendant's arrest was illegal where the only information upon which the arresting officer acted was that a young child was missing and that the defendant babysat the child the night before; however, the improper admission of evidence recovered after the arrest was harmless as such evidence added absolutely nothing inculpatory to the case. *Brewer v. State*, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

Defendant's motion to suppress should have been granted and contraband found in his automobile should not have been admitted at trial over defendant's objection, where his arrest, which was without warrant, preceded the discovery of marijuana in his automobile, and was made at time when officers had less than probable cause to arrest, was illegal. *Floyd v. State*, 500 So. 2d 989 (Miss. 1986), cert. denied, 484 U.S. 816, 108 S. Ct. 68, 98 L. Ed. 2d 32 (1987).

Where a crime had been committed, the persons who committed the crime were fleeing from the scene of the crime in an automobile, the defendants were apprehended because of a traffic violation, and when it appeared that they were apparently the persons who were said to have committed the crime, it became the duty

of the officer to detain them, and when they were identified, it became the duty of the sheriff to arrest them, and after they were arrested, it was his duty to search for weapons, evidence of the crime for which they were arrested, and means of escape, or other means by which they could injure themselves or others, and any other evidence obtained by the search was admissible in the trial. *Chapman v. State*, 284 So. 2d 525 (Miss. 1973).

Where probable cause for arrest terminated when a gun barrel was measured and found to be lawful, the subsequent discovery of contraband drugs on the arrested person was the result of an illegal search and it would not be retroactive to strengthen in any way the factors indicative of probable cause existing at the time of the arrest, and the drugs were not admissible in evidence. *Carroll v. Carroll*, 277 So. 2d 435 (Miss. 1973).

When a crime had recently been committed in the area and a police officer came upon the defendant and observed that he was wearing a concealed weapon, the officer had no choice but to arrest the defendant or prevent him from using his gun and to prevent a breach of the peace; and evidence obtained from a search of the defendant was admissible in court. *Chandler v. State*, 272 So. 2d 641 (Miss. 1973).

Where an accused had been observed sitting in his vehicle in the parking area of a restaurant with his head down on the steering wheel, and a sheriff upon being notified of this, pursued the defendant in his vehicle after the defendant left the restaurant area, the sheriff did not have probable cause to arrest the defendant at the time he began his pursuit in his own unmarked vehicle, and proof of the defendant's conduct in attempting to elude the sheriff and in exchanging shots with the sheriff should have been excluded in a prosecution for assault with a deadly weapon. *Pollard v. State*, 233 So. 2d 792 (Miss. 1970).

Where the defendant was arrested in his automobile by city police outside the city limits, on a misdemeanor charge of switching automobile tags, and later, while defendant was incarcerated, the police conducted searches of the defendant's automobile without having obtained a

search warrant, the searches were unlawful, and evidence seized in such searches was inadmissible in a prosecution of the defendant on a charge of felonious possession of narcotic drugs. *Mellen v. Mellen*, 230 So. 2d 209 (Miss. 1970).

Where a police officer had probable cause to arrest the defendant, a pistol which the defendant voluntarily relinquished upon the officer's request, was properly admitted into evidence at the murder prosecution. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

Where a police officer, informed that there had been a shooting, talked to the victim of the shooting, examined the premises where the shooting was said to have occurred, and talked to witnesses present at the time of the shooting before arresting the defendant, the officer should have been permitted to testify as to the facts which prompted him to make the arrest. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

A pistol seized in the course of an unlawful search of defendant's automobile should not have been admitted in evidence on his trial for possession of a concealed weapon. *Butler v. State*, 212 So. 2d 573 (Miss. 1968).

The temporary detention of a defendant for fingerprinting in the course of an investigation without his being booked, charged, or incarcerated did not constitute an arrest, and evidence derived therefrom was not inadmissible at the defendant's trial on charges of burglary and assault and battery with intent to kill. *Reeves v. Reeves*, 210 So. 2d 780 (Miss. 1968).

Nine one dollar bills, unusual in that the inscription "In God We Trust" was not imprinted on them, removed from the person of the defendant following his arrest without a warrant by an officer who had reasonable cause to believe that a felony had been committed and reasonable cause to believe that the defendant committed it, were admissible in evidence. *Bradshaw v. State*, 192 So. 2d 387 (Miss. 1966), cert. denied, 389 U.S. 941, 88 S. Ct. 299, 19 L. Ed. 2d 293 (1967).

Where defendant testified that he was not informed by the arresting officer of the object and cause of arrest the burden

shifted to the state to prove that there was probable cause for making a charge against him, and where the prosecution introduced no testimony whatsoever to refute the prima facie case of illegal detention and arrest made out by the defendant the testimony of one of the arresting officers as to certain admissions made to him by the defendant should have been excluded. *Clay v. State*, 184 So. 2d 403 (Miss. 1966).

Where a highway patrolman, who had ample information that the crime of rape had been committed and knew that a warrant had been issued, after being stopped by a hitchhiker, whose description fitted the description of the rapist, arrested and searched the hitchhiker, the arrest, being lawful, the search incident thereto was likewise lawful, and the evidence obtained thereby was admissible. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209 (1956).

If an arrest is unlawful, then the search is unlawful and the evidence obtained in the search is not admissible. *Smith v. State*, 228 Miss. 476, 87 So. 2d 917, 58 A.L.R.2d 1052 (1956).

Where a deputy sheriff, in whose presence the defendant sold intoxicating liquors, did not make the arrest when he saw the offense committed, but came back later to make the arrest, the deputy sheriff lost authority to arrest without a warrant and the evidence procured as the result was illegal and not permissible. *Smith v. State*, 228 Miss. 476, 87 So. 2d 917, 58 A.L.R.2d 1052 (1956).

Where it was reported to officers that a man of certain description had attempted to steal an automobile and defendant answered the description and the officers had good ground to believe that a felony had been committed, and the defendant was person who committed the crime, and consequently arrested the defendant without warrant and searched him, the evidence obtained incident to the search was admissible in prosecution for murder. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

Where two officers went upon the premises of the defendant without a search



warrant and purchased intoxicating liquor, this evidence was not obtained by illegal search and was not excludable on the ground of unlawful search and seizure because no search was involved. *Peebles v. State*, 57 So. 2d 263 (Miss. 1952).

Where a warrant entitled the officer to search outhouse of owner and a defendant lived in the block house and ran a cafe on the land of the owner, also paid taxes and this house was between 100 and 200 yards away from house in which owner resided and operated the store, the house used by the defendant was not an outhouse, and the search of the premises, where whisky was found was illegal and the evidence was inadmissible. *Thompson v. State*, 213 Miss. 325, 56 So. 2d 808 (1952).

An arrest by sheriff without a warrant of a person who has committed no crime in his presence is illegal, and a search of the person is likewise illegal and the evidence obtained thereby is inadmissible. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401 (1945).

Arrest of defendant and the search of her person by a sheriff without a warrant therefor was illegal, and consequently evidence that he found on her person a key which fitted the lock of the door to a room in which whisky was found was inadmissible in prosecution for unlawful possession of whisky, notwithstanding that the room was in a house owned by the defendant and for which the sheriff had a proper search warrant, where the defendant lived elsewhere. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401 (1945).

Arrest of defendants, charged with larceny, for trespass not committed in officer's presence, held unlawful, and therefore evidence obtained by search of automobile was inadmissible in larceny prosecution. *Fletcher v. State*, 159 Miss. 41, 131 So. 251 (1930).

An officer who unlawfully enters the premises of a person charged with a misdemeanor not committed in his presence and who has no warrant for the arrest and who finds liquor in said person's possession cannot afterwards give evidence of finding said liquor over the defendant's objection. *Iupe v. State*, 140 Miss. 279, 105 So. 520 (1925).

#### 14. Instructions.

In a prosecution for aggravated assault arising out of an attack upon a police

constable who was in the process of arresting the defendant's brother-in-law, the trial court erred in refusing an instruction of the defense that a person has the right to use reasonable force to resist an unlawful arrest or to aid another in resisting an unlawful arrest where the evidence established that the constable neither had possession of a warrant nor had informed the brother-in-law of the reason for his arrest and where the prosecution failed to present any evidence to show that there was probable cause for the arrest and neither the affidavit nor the arrest warrant was included in the record. *Boyd v. State*, 406 So. 2d 824 (Miss. 1981).

Instruction that town marshal did an unlawful act when he fired into automobile while attempting to arrest occupants who had immediately prior thereto fired into marshal's house with reckless disregard of human life and with intent to injure some person therein held reversible error, since marshal was warranted in making arrest, under statutes, without warrant. *Lee v. State*, 179 Miss. 122, 174 So. 85 (1937).

In action for false imprisonment of plaintiff alleged to be drunk and disorderly, instructions that if officers had good reason to believe plaintiff was committing crime, they were not liable, held properly refused. *Carlisle v. City of Laurel*, 156 Miss. 410, 124 So. 786 (1929).

In action for false imprisonment, instruction to find for plaintiff, unless plaintiff committed crime in defendant's presence, held not too narrow in view of other instructions. *Harris v. Sims*, 155 Miss. 207, 124 So. 325 (1929).

Refusal of instructions relating to manslaughter if defendant killed deceased while resisting unlawful search held not erroneous, in view of defense. *Richardson v. State*, 153 Miss. 654, 121 So. 284 (1929).

#### 15. Third parties.

Defendant's belief that police conduct ultimately might be found to be unconstitutional did not give him right to refuse requests of police officers for entry, search, and arrest of arrestee, within arrestee's mother's house where defendant was a guest. *Bovan v. State*, 706 So. 2d 254 (Miss. 1997).



Observers of progress of arguably illegal police conduct do not have independent right to interfere with it. *Bovan v. State*, 706 So. 2d 254 (Miss. 1997).

Fundamental correctness of planned police conduct is not for observer-citizen to decide; proper place to examine reasonableness of ultimate police action is in court. *Bovan v. State*, 706 So. 2d 254 (Miss. 1997).

## ATTORNEY GENERAL OPINIONS

As an officer can usually make misdemeanor arrests only when a crime occurred in his presence, a merchant arresting a shoplifter should, instead of turning the arrest over to an officer, file an affidavit charging the accused with shoplifting. *Henderson*, Feb. 12, 1992, A.G. Op. #91-0946.

If judge is satisfied that sufficient evidence has been presented to establish probable cause, then judge may sign original warrant and FAX copy to law enforcement, and FAX would constitute official channels communication; original warrant should be delivered to clerk of court as soon as possible. *Bankston*, Oct. 28, 1992, A.G. Op. #92-0807.

This section states that officer may only make warrantless arrest for misdemeanor when misdemeanor has been committed in presence of officer; officer must have warrant in order to arrest for misdemeanor that was not committed in his or her presence, except for domestic violence crimes pursuant to subsection 3 of this section. *Gentry*, June 7, 1993, A.G. Op. #93-0362.

Best procedure to follow in most cases where security guard witnesses crime is for guard to file affidavit against perpetrator in municipal or justice court and then if court believes that probable cause exists, court may then issue warrant for such person's arrest and any law enforcement officer would then be fully authorized to make arrest. *Norman*, August 4, 1993, A.G. Op. #93-0466.

An officer who has probable cause to believe a felony was committed by a certain individual may make an arrest without a warrant. *Graham*, Nov. 14, 1997, A.G. Op. #97-0726.

## 16. Jurisdiction.

The supreme court has initial jurisdiction over a post-conviction proceeding where that court is the one that last exercised jurisdiction in the case. *Perry v. State*, 759 So. 2d 1269 (Miss. Ct. App. 2000).

An officer who has probable cause to believe a felony was committed by a certain individual may make an arrest without a warrant. *King*, May 8, 1998, A.G. Op. #98-0253.

The statute provides the powers of arrest for law enforcement officers and private citizens, which would include private security officers. *Conerly*, July 24, 1998, A.G. Op. #98-0394.

While officers are mandated to make an arrest if the incident occurred within 24 hours, nothing specifies that the sworn affidavit or complaint must be filed within the 24-hour time period as well; thus, the officer may still sign an affidavit, and the arrest is still valid, even though 24 hours may have passed since the time of the arrest. *Anderton*, March 17, 2000, A.G. Op. #2000-0128.

An officer may not make a misdemeanor arrest without a warrant being issued unless the offense is committed in the officer's presence or the offense is an act of domestic violence that has occurred within 24 hours of the arrest. *Stewart*, March 24, 2000, A.G. Op. #2000-0145.

"Family or household member", as that term is used in Sections 97-3-7 and 99-3-7, includes individuals who are married, were married, or who live together in a relationship, although not married; further, it is not limited to a blood relationship and can relate to an in-law relationship or other relatives of one spouse living in the household; however, "boyfriend-girlfriend" (or any other variation of this) relationships are not included in the definition of "family or household member", unless the persons reside or resided together as spouses; finally, although not falling into the definition of "family or

household member”, if the individuals have a biological or legally adopted child between them, the relationship is also protected. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

The violation of a protective order issued by a municipal court is sufficient to support a warrantless arrest of the violator; further, the relevant statutory language is broadly drafted and includes violation of a restraining order issued during a criminal prosecution for a domestic violence offense by any court with jurisdiction over the offense. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

The statute places the burden on law enforcement to file the charges following a warrantless arrest. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

Any individual violating a restraining order or injunction issued under the Protection from Domestic Abuse Law or a similar order from a foreign court may be arrested without a warrant and charged with a violation of § 93-21-21. Dantin, Apr. 26, 2002, A.G. Op. #02-0212.

When a security guard or private citizen makes an arrest pursuant to this section, it is possible, although not mandated, for a law enforcement officer to continue that arrest. The law enforcement officer could transport the detainee to an appropriate location, i.e., justice court or jail and secure a warrant based on the citizen's affidavit or release the detainee if the court does not find probable cause to issue a warrant. Beshears, May 28, 2004, A.G. Op. 04-0219.

## RESEARCH REFERENCES

**ALR.** Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace. 58 A.L.R.2d 1056.

Police officer's power to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 A.L.R.2d 1432.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 A.L.R.4th 328.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

Application of “plain feel” exception to warrant requirements—state cases. 50 A.L.R.5th 581.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 37 et seq.

9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

44 Am. Jur. Proof of Facts 2d 229, Lack of Probable Cause for Warrantless Arrest.

**Lawyers' Edition.** What constitutes probable cause for arrest. 28 L. Ed. 2d 978.

**Law Reviews.** 1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss. L. J. 162, March 1983.

**Practice References.** Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

## § 99-3-9. Arrest of defendants in presence of court without process.

After an indictment is returned into court by the grand jury, the court may direct any defendant who has not been arrested to be taken into custody in the presence of the court, without process therefor.

**SOURCES:** Codes, 1857, ch. 64, art. 261; 1871, § 2798; 1880, § 3009; 1892, § 1350; Laws, 1906, § 1422; Hemingway's 1917, § 1178; Laws, 1930, § 1202; Laws, 1942, § 2445.

### ATTORNEY GENERAL OPINIONS

A criminal warrant does not have a return date. However, if a defendant's bond is made returnable to a plea date, such a date would constitute the return day of process. If a defendant pleads not guilty on the plea date, the court should inquire if the defendant demands a jury

trial. If the bond is returnable to a trial date, the trial date is considered the return day of process and the defendant could demand a jury trial at any time until the trial begins. Hood, Sept. 17, 2004, A.G. Op. 04-0455.

### RESEARCH REFERENCES

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

### § 99-3-11. Arresting officer or person may break into house.

To make an arrest an officer or private person, after notice of his office and object, if admittance is refused, may break open a window or outer or inner door of any dwelling or house in which he has reason to believe the offender may be found.

**SOURCES:** Codes, 1857, ch. 64, art. 277; 1871, § 2777; 1880, § 3027; 1892, § 1376; Laws, 1906, § 1448; Hemingway's 1917, § 1205; Laws, 1930, § 1228; Laws, 1942, § 2471.

### JUDICIAL DECISIONS

#### 1. In general.

Where a police officer was pursuing the defendant in an effort to arrest him for an offense committed in the officer's presence, the officer had the right to enter the defendant's house in continuance of the hot pursuit of the defendant and to use force, if necessary, in order to do so. *Watts v. State*, 305 So. 2d 348 (Miss. 1974).

In his trial for murder of a police officer, defendant's contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed

following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. *Norman v. State*, 302 So. 2d 254 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453 (1975).

When the sheriff of Stone County in his search for a felon who had fled from Forrest County found that the suspect was in a room in a motel in his jurisdiction, he had probable cause to enter the fleeing felon's motel room and arrest him, and it became his duty to make a search of the prisoner, his personal effects, and the immediate surroundings where the arrest



was made. *Brown v. State*, 217 So. 2d 521 (Miss. 1969).

An officer cannot enter the home of one charged with crime after the defendant has been arrested and incarcerated in jail without his consent or without a valid search warrant. *May v. State*, 199 So. 2d 635 (Miss. 1967).

When an officer is required to go into a dwelling house or a place for the purpose of making an arrest, he may observe the surrounding scene of the alleged crime, and make a search of the person arrested and of the surroundings, and in so doing he may take pictures of the area, and may seize elements of the crime, including weapons, and articles that may be em-

ployed by the offender to make an escape. *May v. State*, 199 So. 2d 635 (Miss. 1967).

Evidence of killing of constable, when constable, armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and without stating his purpose, held not to authorize conviction for crime higher than manslaughter. *Jones v. State*, 170 Miss. 581, 155 So. 430 (1934).

A person having a warrant for the arrest of a criminal may enter any house in which he has reason to believe and does believe said criminal is, without being liable to the owner of the premises searched. *Monette v. Toney*, 119 Miss. 846, 81 So. 593, 5 A.L.R. 261 (1919).

### RESEARCH REFERENCES

**ALR.** Police officer's to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 A.L.R.2d 1432.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 92 et seq.

**CJS.** 6A C.J.S., Arrest §§ 10 et seq.

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

### § 99-3-13. Officer may pursue and apprehend offender any place in state; jailing prisoner for safekeeping.

If a person commit an offense and be pursued by a sheriff or constable, and escape from the county of the officer, the officer may pursue and apprehend him in any county and take him to the county in which the offense was committed; and in all cases an officer or other person having the lawful custody of a prisoner, passing through any county on his route, may lodge the prisoner in any jail for safekeeping, as circumstances require. In like manner if a person commit an offense within the corporate limits of an incorporated municipality and be pursued by a marshal or any other municipal peace or police officer and shall escape from the municipality, such municipal peace or police officer may pursue and apprehend such offender to places without the corporate limits of the municipality and to any place within the State of Mississippi to which such person may flee and may return such person to the municipality in which such offense was committed.

**SOURCES:** Codes, 1880, § 3034; 1892, § 1382; Laws, 1906, § 1454; Hemingway's 1917, § 1211; Laws, 1930, § 1234; Laws, 1942, § 2477; Laws, 1948, ch. 434.

**Cross References** — Arrest of convicted offender receiving parole or suspended sentence who fails to surrender himself for execution of sentence on expiration of parole or suspended sentence, see § 99-19-27.

Arrest of fugitives from justice in other states, see § 99-21-1.

## JUDICIAL DECISIONS

**1. In general.**

Where officers had probable cause to believe that a felony had been committed and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. *Nash v. State*, 207 So. 2d 104 (Miss. 1968).

Since the functions of the sheriff are confined to his own county, except in the case of the pursuit of an escaping offender, there can be no recovery on a sheriff's bond for the alleged unlawful treatment of

one accused of crime apprehended in another state where such treatment and the event complained of occurred in such other state. *McLean v. Mississippi ex rel. Roy*, 96 F.2d 741, 119 A.L.R. 670 (5th Cir. 1938), cert. denied, 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399 (1938).

A sheriff of one county who is not in pursuit of an escaping offender located in another county has no authority to go out of his county, carry a deadly weapon concealed and arrest such offender. *Shirley v. State*, 100 Miss. 799, 57 So. 221, Am. Ann. Cas. 1914A,252 (1912).

## ATTORNEY GENERAL OPINIONS

Under Section 99-3-13, a municipal Police Department may authorize a municipal police officer that has also been sworn as a deputy sheriff to respond to a request for assistance by the Sheriff's Department in his capacity as a deputy sheriff. *Turner*, May 17, 1995, A.G. Op. #95-0247.

Although police officers of a municipal-ity have no police authority outside the

municipal limits unless acting under the hot pursuit doctrine, a city and county may enter into an interlocal agreement where the municipal police officers are also sworn as deputy sheriffs and thereby may respond to a request for assistance by the Sheriff's Department in his capacity as a deputy sheriff. *Moore*, July 10, 1998, A.G. Op. #98-0376.

## RESEARCH REFERENCES

**ALR.** Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 A.L.R.4th 328.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 34 et seq., 69 et seq.

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

## § 99-3-15. Escaped offender may be pursued and retaken without warrant.

If an offender escape or be rescued, the person from whose possession or custody he escaped or was rescued, may immediately pursue and retake him at any time and in any county without warrant.

**SOURCES:** Codes, 1857, ch. 64, art. 278; 1871, § 2778; 1880, § 3028; 1892, § 1377; Laws, 1906, § 1449; *Hemingway's* 1917, § 1206; Laws, 1930, § 1229; Laws, 1942, § 2472.

**Cross References** — Escape of prisoners, see §§ 97-9-27 et seq.

Arrest of convicted offender receiving parole or suspended sentence who fails to surrender himself for execution of sentence on expiration of parole or suspended sentence, see § 99-19-27.

Arrest of fugitives from justice in other states, see § 99-21-1.

Arrests without a warrant, see Miss. Unif. Cir. & County Ct. Prac. R. 6.03.

### RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Arrest § 46.

**CJS.** 6A C.J.S., Arrest §§ 17 et seq.

**Practice References.** Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

### § 99-3-17. Offender must be taken before proper officer without delay.

Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case, except as otherwise provided in Section 99-3-18.

**SOURCES:** Codes, 1857, ch. 64, art. 279; 1871, § 2779; 1880, § 3029; 1892, § 1378; Laws, 1906, § 1450; Hemingway's 1917, § 1207; Laws, 1930, § 1230; Laws, 1942, § 2473; Laws, 1980, ch. 446, § 2, eff from and after July 1, 1980.

**Cross References** — Handling of persons arrested by railroad police officers, see § 77-9-507.

Post-arrest release on written notice to appear at later date, see § 99-3-18.

Defendant's initial appearance, see Miss. Unif. Cir. & County Ct. Prac. R. 6.03.

Preliminary hearing, see Miss. Unif. Cir. & County Ct. Prac. R. 6.04.

### JUDICIAL DECISIONS

1. In general.
2. Effect of delay, generally.
3. Admissibility of confession.
4. Waiver of rights.

#### 1. In general.

A city police chief who arbitrarily promulgated and enforced a rule that civil rights demonstrators arrested for parading without a permit should not be taken before a magistrate violated Code 1942, § 2473. *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S. Ct. 53, 34 L. Ed. 2d 89 (1972).

The purpose of a preliminary hearing is to determine whether probable cause exists to hold a person for trial, and a defendant formally indicted by a grand jury before his arrest was not entitled to a preliminary hearing. *Stevenson v. State*, 244 So. 2d 30 (Miss. 1971).

A petition for writ of error coram nobis was denied where there was nothing in the record to indicate that the defendant

was prejudiced by the failure to afford him a preliminary hearing. *In re Woodruff*, 253 Miss. 827, 179 So. 2d 268 (1965).

The requirement that an offender shall be taken before the proper officer without unnecessary delay for examination of his case is in furtherance of the legislative purpose to insure a speedy and public trial as guaranteed by § 26 of the Constitution. *Jones v. State*, 250 Miss. 186, 164 So. 2d 799 (1964).

Person arrested on charge of drunkenness has no right to demand detention in any particular place, pending return to sobriety and perfection of charge, except to extent that any lodgment elsewhere than in jail of county of arrest will work unreasonably to deny accused right to obtain bail or speedy trial. *State, ex rel. Kelley, v. Yearwood*, 204 Miss. 181, 37 So. 2d 174 (1948).

Temporary confinement of a drunken woman in jail of county rather than county of arrest instead of taking her



before officer for examination of her case is not unlawful imprisonment when the arrest is made on Sunday, prisoner is in no condition to be given a hearing, and jail in which she is confined is most convenient and suitable for detention of a woman. *State, ex rel. Kelley, v. Yearwood*, 204 Miss. 181, 37 So. 2d 174 (1948).

This section [Code 1942, § 2473] not only contemplates that an accused shall be given a trial of his case without unnecessary delay, but that a person arrested by an officer or private person with or without a warrant, for any indictable offense committed in his presence or where the arrest is made on probable cause or suspicion that the accused has committed a felony, shall not be detained for any unreasonable length of time without being afforded an opportunity to have a hearing on the merits of the accusation against him. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

## 2. Effect of delay, generally.

The failure to provide a defendant with an initial appearance until five days after his arrest even though a judge was available at all times constituted reversible error where the defendant gave a confession in the absence of counsel and in violation of his right to counsel as a consequence of the delay, and the defendant's conviction for capital murder was based entirely on his confession. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).

Although assuming, but not deciding that an unexplained three and one half day delay in affording a defendant a preliminary hearing to be undue delay, there is no authority to the effect that such delay entitled the accused to an outright discharge on the charge of armed robbery. *Dunning v. State*, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

The failure to carry a defendant before a judicial officer without unnecessary delay for examination after his arrest does not entitle him to a directed verdict of not guilty. *Harper v. State*, 251 Miss. 699, 171 So. 2d 129 (1965).

Where the state knows the identity of the accused, has the accused in custody, obtains a confession, and holds the accused in the penitentiary for a period of

over eight years, during which time he has suffered many disadvantages, then the delay is vexatious, capricious, and oppressive, and the accused has been denied the speedy trial as contemplated by the constitution. *Jones v. State*, 250 Miss. 186, 164 So. 2d 799 (1964).

## 3. Admissibility of confession.

Delay in taking the prisoner before a magistrate for a preliminary hearing did not render his confession inadmissible where there was no evidence that the delay resulted in the confession being involuntary. *Dickens v. State*, 311 So. 2d 650 (Miss. 1975).

It does not follow that a violation of this section [Code 1942, § 2473] renders inadmissible a confession, freely and voluntarily made while the accused is in custody, where the confession was not induced by threats, force or promises. *Parker v. State*, 244 Miss. 332, 141 So. 2d 546 (1962), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Delay in giving a preliminary hearing may properly be considered in determining the admissibility of a confession obtained in the meantime. *Tyson v. State*, 237 Miss. 149, 112 So. 2d 563, 72 A.L.R.2d 1319 (1959).

Where an offense was committed on Saturday morning and defendant was arrested on Sunday morning and on Monday he was indicted, and where on the day of arrest neither the grand jury nor justice of peace was in session, the defendant was indicted without unnecessary delay and confession obtained was not result of any illegal detention. *Robinson v. State*, 223 Miss. 70, 77 So. 2d 265 (1955), cert. denied, 350 U.S. 851, 76 S. Ct. 91, 100 L. Ed. 757 (1955).

In robbery prosecution the mere fact that confessions were made while defendants were in custody and before preliminary hearings were had does not render the confessions inadmissible. *Winston v. State*, 209 Miss. 799, 48 So. 2d 513 (1950).

It is not necessary for arresting officer to summon member of suspect's family or friend or lawyer when arrest is made to attend interrogation to be conducted by officers and confession was not involuntary for this reason when accused was arrested in presence of his father and

mother, who knew that he was being incarcerated, and there was no refusal to permit attorneys of prisoner to have access to him after they were employed in case. *Moore v. State*, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

#### 4. Waiver of rights.

Only a magistrate, at a preliminary hearing and after advising the defendant of the nature of the charge against him and permitting him to plead to it, may accept a waiver of preliminary hearing.

*Harper v. State*, 251 Miss. 699, 171 So. 2d 129 (1965).

The giving of an appearance bond by the defendant in a prosecution charging the defendant with being an accessory before the fact to the crime of robbery, to wait the action of the grand jury, amounted to a discontinuance of the prosecution in the justice of the peace court, and a waiver of the defendant's right under this section [Code 1942, § 2473] to be taken before that officer for a preliminary examination of his fee. *De Angelo v. State*, 187 Miss. 84, 192 So. 444 (1939).

### ATTORNEY GENERAL OPINIONS

After a warrantless arrest, a justice court judge must make a determination of probable cause for the arrest at the defendant's initial appearance and may issue a warrant after the fact concerning this finding or may otherwise make a record of such determination. *Anderson*, Aug. 8, 1997, A.G. Op. #97-0477.

A police department must bring a defendant before a judicial officer for an initial appearance immediately upon availability, and in no case may a defendant be

held in custody without an initial appearance beyond 48 hours after arrest. *Via*, Dec. 27, 1999, A.G. Op. #99-0679.

A defendant does not have to be taken to a jail after being arrested, but may be brought before a judge to determine conditions for release. Furthermore, an individual who has been arrested may be released prior to being taken to a jail upon a written notice to appear in court. *Erby*, Mar. 26, 2004, A.G. Op. 04-0138.

### RESEARCH REFERENCES

**ALR.** Intoxication as ground for police postponing arrestee's appearance before magistrate. 3 A.L.R.4th 1057.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern cases. 28 A.L.R.4th 1121.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions—post-*Connelly* cases. 48 A.L.R.5th 555.

When may dismissal for violation of Speedy Trial Act (18 USCS §§ 3161-3174) be with prejudice to government's right to reinstate action. 98 A.L.R. Fed. 660.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 99 et seq.

26 Am. Jur. Proof of Facts 2d 617, False Imprisonment—Failure to Take Arrestee Before Magistrate Without Unreasonable or Unnecessary Delay.

41 Am. Jur. Trials 394, Habeas Corpus: Pretrial Motions (right to speedy trial).

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

### § 99-3-18. Post-arrest release on written notice to appear at later date.

(1) In any case in which a person is arrested for an offense declared to be a misdemeanor and does not demand to be taken before a municipal judge,

justice court judge or other judge, such person may, instead of being taken before a judge, be released according to the procedures set forth by this section and Section 99-3-17. If the arresting officer or his superior determines that the person should be released, such officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of such person, the offense charged, and the time when and place where such person shall appear in court. If the person is not released prior to being booked and the officer in charge of the booking or his superior determines that the person should be released, such officer or superior shall prepare such written notice to appear in court. Unless waived by the arrested person, the time specified in the notice to appear shall be at least five (5) days after arrest. The place specified in the notice shall be the court of the municipal judge, justice court judge or other judge before whom the person would be taken if the requirement of taking an arrested person before a judge were complied with, or shall be an officer authorized by such court to receive a deposit of bail.

(2) The officer shall deliver one (1) copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his written promise to appear in court by signing the duplicate notice which shall be retained by the officer. Thereupon the arresting officer shall forthwith release the person arrested from custody. The officer shall, as soon as practicable, file the duplicate notice with the municipal judge, justice court judge or other judge specified therein. No warrant shall issue on such charge for the arrest of a person who has given such written promise to appear in court, unless and until he has violated such promise or has failed to appear for trial or judgment, or to comply with the terms and provisions of the judgment, as required by law.

(3) If the arrested person is not released pursuant to the provisions of this section and Section 99-3-17 prior to being booked by the arresting agency, then at the time of booking, the officer in charge of such booking or his superior officer, or any other person designated by a city or county for this purpose may make an immediate investigation into the background of the person to determine whether he should be released pursuant to the provisions of this section and Section 99-3-17. Such investigation shall include, but need not be limited to, the person's name, address, length of residence at that address, length of residence within this state, marital and family status, employment, length of that employment, prior arrest record and such other facts relating to the person's arrest which would bear on the question of his release pursuant to the provisions of this section and Section 99-3-17.

**SOURCES:** Laws, 1980, ch. 446, § 1, eff from and after July 1, 1980.

**Cross References** — Handling of persons arrested by railroad police officers, see § 77-9-507.

Requirement that persons not released pursuant to this section be taken before proper officer without delay, see § 99-3-17.



ATTORNEY GENERAL OPINIONS

Pursuant to Section 99-3-18, assuming an ordinance is valid, a criminal affidavit should be filed to initiate charges for violations of county ordinances passed by the Board of Supervisors. Oster, September 20, 1996, A.G. Op. #96-0614.

An officer may release a defendant that has been charged with a traffic offense and is in his custody on a written notice to appear or if that officer has been designated by the municipal judge, may take a

bond, cash or otherwise, from such a defendant. Powell, Jan. 10, 2003, A.G. Op. #02-0766.

A defendant does not have to be taken to a jail after being arrested, but may be brought before a judge to determine conditions for release. Furthermore, an individual who has been arrested may be released prior to being taken to a jail upon a written notice to appear in court. Erby, Mar. 26, 2004, A.G. Op. 04-0138.

RESEARCH REFERENCES

**ALR.** Admissibility of confession or other statement made by defendant as affected by delay in arraignment-modern cases. 28 A.L.R.4th 1121.

**Am Jur.** 5 Am. Jur. 2d, Arrest §§ 99 et seq.

**CJS.** 6A C.J.S., Arrest §§ 58-61.

§ 99-3-19. Warrant good across county line.

When a person accused of any offense removes or escapes to another county, a warrant issued by a justice of the peace in the county in which the offense was committed shall authorize the arrest of such offender, and his removal to the county in which the offense was committed or is triable.

**SOURCES:** Codes, 1857, ch. 64, art. 333; 1871, § 2826; 1880, § 3032; 1892, § 1380; Laws, 1906, § 1452; Hemingway's 1917, § 1209; Laws, 1930, § 1232; Laws, 1942, § 2475.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

**ALR.** Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records. 45 A.L.R.4th 550.

**Am Jur.** 5 Am. Jur. 2d, Arrest § 35.

§ 99-3-21. Justice of the peace may issue warrant for offender coming into his jurisdiction.

A justice of the peace of any county into which an offender may have removed himself or escaped, on the oath of some credible person, may issue his warrant for the arrest of such offender, returnable before any justice of the peace of the county where the offense is cognizable, which shall authorize the arrest and removal of such offender to the proper county for examination.

**SOURCES:** Codes, 1857, ch. 64, art. 335; 1871, § 2828; 1880, § 3033; 1892, § 1381; Laws, 1906, § 1453; Hemingway's 1917, § 1210; Laws, 1930, § 1233; Laws, 1942, § 2476.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Criminal jurisdiction of justices of the peace, see § 99-33-1.

## RESEARCH REFERENCES

**ALR.** Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

### § 99-3-23. No liability for legal arrest.

Officers and others who make arrests as authorized or required by law, shall not be liable on account thereof, civilly or criminally, notwithstanding it may appear that the party arrested was innocent of any offense.

**SOURCES:** Codes, 1857, ch. 64, art. 280; 1871, § 2780; 1880, § 3030; 1892, § 1379; Laws, 1906, § 1451; Hemingway's 1917, § 1208; Laws, 1930, § 1231; Laws, 1942, § 2474.

## JUDICIAL DECISIONS

### 1. In general.

A constable who did not begin pursuit of defendant motorist until after the defendant had driven away at such a fast rate of speed his companions became alarmed for their safety was not engaged in an illegal attempt to arrest him. *Shinall v. State*, 199 So. 2d 251 (Miss. 1967), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660 (1967), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

In action for false imprisonment against officer who arrested plaintiff for drunkenness on public highway and had her confined in jail of county other than county of arrest, verdict for defendant will be allowed to stand where instructions taken as a whole correctly submit issue of unnecessary and unreasonable detention and failure, if any, to have plaintiff carried without delay before proper officer. *State, ex rel. Kelley, v. Yearwood*, 204 Miss. 181, 37 So. 2d 174 (1948).

Deputy sheriff's killing of unarmed man, whom deputy sought to arrest without warrant as he approached illicit still, when he put his hand to hip pocket instead of obeying deputy's command to raise his hands, held negligent, unnecessary, and wrongful act rendering deputy, the sheriff, and the surety on latter's bond liable to deceased's widow and children for damages as matter of law. *Hinton v. Sims*, 171 Miss. 741, 158 So. 141 (1934), error overruled, 171 Miss. 741, 158 So. 778 (1935).

Where plaintiff proved arrest and detention without warrant, burden of proof shifted to defendant to prove justification for arrest. *Harris v. Sims*, 155 Miss. 207, 124 So. 325 (1929).

Officer arresting person without warrant, mistaking him for one wanted for crime, and putting him in jail over his protest, is liable therefor, he making no misstatements or misrepresentations leading to his arrest. *Vice v. Holley*, 88 Miss. 572, 41 So. 7 (1906).

## RESEARCH REFERENCES

**ALR.** Penalties for common-law criminal offense of false imprisonment. 67 A.L.R.4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

**Am Jur.** 10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 22.3 (Complaint, petition, or declaration-Unreasonable detention and search of customer on accusation of shoplifting).

## § 99-3-25. Duty of officers to arrest gamblers, bucket-shop operators and futures dealers.

It shall be the duty of the sheriff, justices, constables, and all other civil officers of the county, and of every police officer of any city, town or village, when they know or have reason to suspect any person to be guilty of a violation of the provisions of law in reference to gambling or gaming, or operating a bucket-shop or any business dealing in contracts commonly called "futures," to apprehend such person, and bring him before some officer having jurisdiction thereof, and to appear and prosecute such offender.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 11(4); 1857, ch. 64, art. 149; 1871, § 2612; 1880, § 2858; 1892, § 1383; Laws, 1906, 1455; Hemingway's 1917, § 1212; Laws, 1930, § 1235; Laws, 1942, § 2478; Laws, 1950, ch. 344.

## JUDICIAL DECISIONS

### I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

### II. UNDER FORMER LAW.

11. In general.

### I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

### II. UNDER FORMER LAW.

11. In general.

Gambling statute, in so far as it authorizes arrest without warrant for misde-

meanor not committed in presence of officer making arrest, held to violate constitution. Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

## § 99-3-27. Tramps; arrest by any person; proceedings.

Any person may arrest a tramp and take him before a justice of the peace, who shall at once take the affidavit of such person charging the offense, and shall then try the accused for being a tramp, and deal with him accordingly, if found guilty.

**SOURCES:** Codes, 1880, § 2962; 1892, § 1311; Laws, 1906, § 1385; Hemingway's 1917, § 1128; Laws, 1930, § 1158; Laws, 1942, § 2395.



**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Another section derived from same 1942 code section, see § 97-35-31.

**§ 99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.**

(1)(a) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent offender program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent offender program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

(b) The authority receiving any such charge or complaint against a teacher, jail officer, counselor at an adolescent offender program or law enforcement officer shall immediately present same to the county prosecuting attorney having jurisdiction who shall immediately present the charge or complaint to a circuit judge in the judicial district where the action arose for disposition pursuant to this section.

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or wellbeing of the public.

**SOURCES:** Laws, 2001, ch. 566, § 3; Laws, 2002, ch. 488, § 1; Laws, 2004, ch. 486, § 1, eff from and after July 1, 2004.

**Cross References** — Teachers, in general, see §§ 37-9-1 et seq.

**ATTORNEY GENERAL OPINIONS**

A justice court does not have jurisdiction to issue an arrest warrant against a teacher or law enforcement officer for ac-

tions that occur while they are performing their official duties; such complaints should be referred to the circuit court for

resolution, however, this does not preclude a justice court from making a probable cause determination and issuing an arrest warrant for a teacher or law enforcement officer for actions that occur when they are not on official duty. Branch, Oct. 4, 2002, A.G. Op. #02-0578.

This section requires a probable cause determination to be made by a circuit judge prior to a municipal or justice court commencing a criminal trial against a teacher or law enforcement officer for an offense committed within the performance of official duties. Tucker, Aug. 29, 2003, A.G. Op. 03-0440.

A law enforcement officer (or teacher) may be indicted by a grand jury for offenses committed in the performance of

his duties, without a circuit judge conducting a probable cause hearing as required by this section. Furthermore, there would be no need to conduct a probable cause hearing after an indictment has been returned by a grand jury but prior to the arrest of the law enforcement officer (or teacher) on the indictment. Mellen, Mar. 3, 2004, A.G. Op. 04-0095.

This section does not apply to a situation where a law enforcement officer observes a crime being committed in his presence. The officer may arrest the offender without a warrant and take him before a circuit judge for a probable cause determination. Bullock, June 21, 2004, A.G. Op. 04-0260.

### § 99-3-29. Perjury; court may commit wilful perjurer to prison immediately.

Whenever it shall appear to any court that a witness or party who has been sworn or examined in any case, matter, or proceeding pending before the court, has testified in such manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter, the court may immediately commit such party or witness, by an order of process for that purpose, to prison, to take bond or recognizance with sureties for his appearing and answering to an indictment for perjury.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(5); 1857, ch. 64, art. 207; 1871, § 2663; 1880, § 2924; 1892, § 1384; Laws, 1906, § 1456; Hemingway's 1917, § 1213; Laws, 1930, § 1236; Laws, 1942, § 2479.

**Cross References** — Perjury generally, see §§ 97-9-59 et seq.  
Indictment for perjury, see § 99-7-39.

## JUDICIAL DECISIONS

### 1. In general.

In prosecution for contempt of court for violation of temporary injunction issued to have the premises of the defendant declared a common nuisance, where the chancellor bound the accused over to await action of the grand jury on the charge of perjury as a result of information obtained aliunde the record, the chancellor did not deal unfairly with the accused as regards his guilt and sentence. McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954).

The action of a trial court in committing the defendant to the custody of the sheriff to await the action of the grand jury on the charge of perjury was no such prejudice or bias as to disqualify him from performing his duties as a trial judge in the case after an indictment has been returned by the grand jury. Clanton v. State, 210 Miss. 700, 50 So. 2d 567 (1951).

A witness should not be adjudged in contempt and punished for false swearing except in pursuance of the procedure prescribed by this statute unless it could be

safely said that the trial judge has found the witness guilty as a result of his own personal or judicial knowledge of the facts in regard to which the testimony has been given. *McInnis v. State*, 202 Miss. 715, 32 So. 2d 444 (1947).

The arrest provided for by this section [Code 1942, § 2479] must not be made in the presence and hearing of the jury; to do so operates a reversal. *Brandon v. State*, 75 Miss. 904, 23 So. 517 (1898).

If upon the trial of a misdemeanor the court erroneously causes the arrest of a witness for perjury in the presence of the jury it is not reversible error if before the end of the trial the court recognizes the right of defendant to begin anew before another jury, and defendant elects to waive such right and proceed, his waiver being beyond recall. *Chase v. State*, 75 Miss. 502, 22 So. 828 (1897).

### **§ 99-3-31. Perjury; witnesses to be bound over for grand jury and trial.**

When a person has been committed to custody under Section 99-3-29 the court shall thereupon bind over the witnesses necessary to establish the perjury to appear at the proper court to testify before the grand jury and on the trial, in case an indictment be found for such perjury.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 5(6); 1857, ch. 64, art. 208; 1871, § 2664; 1880, § 2925; 1892, § 1385; Laws, 1906, § 1457; Hemingway's 1917, § 1214; Laws, 1930, § 1237; Laws, 1942, § 2480.

**Cross References** — Perjury generally, see §§ 97-9-59 et seq.  
Indictment for perjury, see § 99-7-39.

### **§ 99-3-33. Perjury; court may detain documents.**

If, on the hearing of any cause, matter or proceeding in which perjury shall be suspected to have been committed, any paper or document produced by either party be deemed necessary to be used in the prosecution for perjury, the court may by order detain the paper or document from the party producing it, and direct that it be delivered to the district attorney.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 5(7); 1857, ch. 64, art. 209; 1871, § 2665; 1880, § 2926; 1892, § 1386; Laws, 1906, § 1458; Hemingway's 1917, § 1215; Laws, 1930, § 1238; Laws, 1942, § 2481.

**Cross References** — Perjury generally, see §§ 97-9-59 et seq.  
Indictment for perjury, see § 99-7-39.

### **§ 99-3-35. Reward for arrest and delivery of fleeing killer.**

A person who shall arrest anyone who kills another and is fleeing, or attempting to flee, before arrest, and shall deliver him up for trial, shall be entitled to the sum of one hundred dollars out of the treasury of the county in which the homicide occurred, upon the allowance of the circuit court and the board of supervisors of the county in the manner provided by law.



**SOURCES:** Codes, 1857, ch. 64, art. 286; 1871, § 2786; 1880, § 3035; 1892, § 1387; Laws, 1906, § 1459; Hemingway's 1917, § 1216; Laws, 1930, § 1239; Laws, 1942, § 2482; Laws, 1910, ch. 187.

**Cross References** — Officers entitled to statutory reward for arrest of fleeing homicides, see § 99-3-37.

Reward for information leading to apprehension of any person subsequently convicted of any crime or misdemeanor committed in the state, see § 99-3-39.

## JUDICIAL DECISIONS

1. In general.
2. Eligibility of peace officers.
3. Flight.
4. Claim for reward; who liable.

### 1. In general.

This section [Code 1942, § 2482] is not designed to reward mere informers. *Ex parte Davis*, 208 Miss. 430, 44 So. 2d 526 (1950).

Reward cannot be allowed under this section [Code 1942, § 2482] to claimant who makes no arrest of fleeing homicide but merely advises him against flight, leaving criminal free to come and go as he pleases up to point when officer takes him into custody. *Ex parte Davis*, 208 Miss. 430, 44 So. 2d 526 (1950).

This section [Code 1942, § 2482] should be liberally construed in favor of the person making the arrest. *Warren County v. Lanier*, 87 Miss. 606, 40 So. 429 (1905); *Ex parte Webb*, 96 Miss. 8, 49 So. 567 (1909); *Ex parte Austin*, 129 Miss. 869, 93 So. 369 (1922); *Ex parte Fairley*, 162 Miss. 456, 139 So. 399 (1932).

One is entitled to the reward under this section [Code 1942, § 2482] where he arrests a fugitive who was before arrested on a charge of assault and battery with intent to kill and is by the magistrate discharged, the wound proving mortal after such discharge and the second arrest being for murder. *Newton County v. Doolittle*, 72 Miss. 929, 18 So. 451 (1895).

One is entitled to the reward under this section [Code 1942, § 2482] where a mortal wound is inflicted though the wounded person be not dead when the arrest is made. *Martin v. Copiah County*, 71 Miss. 407, 15 So. 73 (1894).

If a homicide have never been in the custody of the officers of the law even though he were previously arrested by a

private party from whom he escaped before being surrendered to the officers the party arresting and delivering him is entitled to the reward. *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128 (1886).

One who rearrests an escaped homicide is not entitled to the reward. *Itawamba County Supvrs. v. Candler*, 62 Miss. 193 (1884).

### 2. Eligibility of peace officers.

State highway patrolman, not being peace officer, has same authority that private citizen would have to make arrest of fleeing homicide under same circumstances, and no more, and would be entitled to receive statutory reward the same as if he had been private citizen and had made arrest and delivery of prisoner under circumstances provided for by this section [Code 1942, § 2482]. *Smith v. Rankin County*, 208 Miss. 792, 45 So. 2d 592 (1950).

On consideration of public policy, police officer cannot lawfully claim reward for performance of service which it was his duty to discharge. *In re Aultman*, 205 Miss. 397, 38 So. 2d 901 (1949).

Member of police force who arrests fleeing homicide in city and county in which officer resides, the city paying him fixed salary for his services as officer, is ineligible to receive reward provided for under this section [Code 1942, § 2482] for arrest of fleeing homicide, homicide and arrest occurring within corporate limits of city. *In re Aultman*, 205 Miss. 397, 38 So. 2d 901 (1949).

A sheriff of another state who arrests in his own state a person who killed another in this state and is fleeing from arrest and merely notifies by telegraph the sheriff of the county where the homicide was committed is not entitled to the reward pro-

vided by this section [Code 1942, § 2482] because he did not deliver up the prisoner for trial and was under legal duty to make the arrest. *Gould v. Chickasaw County*, 85 Miss. 123, 37 So. 710 (1905).

A sheriff of Texas is not entitled for arresting in Texas a person thereafter committing a homicide in Mississippi to the reward provided by the section [Code 1942, § 2482]. *Rucker v. State*, 18 So. 121 (Miss. 1895).

Officers under obligations as such to make the arrest were not entitled to the reward provided for in this section [Code 1942, § 2482]. *Ex parte Gore*, 57 Miss. 251 (1879).

### 3. Flight.

Claim of fleeing homicide that flight was for another purpose than to avoid arrest would not defeat claim for reward under statute. *Ex parte Fairley*, 162 Miss. 456, 139 So. 399 (1932).

Where there is killing followed by flight of the homicide, conclusive presumption under statute respecting reward is that flight was for purpose of avoiding arrest. *Ex parte Fairley*, 162 Miss. 456, 139 So. 399 (1932).

A person who hides in a barn is fleeing or attempting to flee. *Ex parte Austin*, 129 Miss. 869, 93 So. 369 (1922).

The homicide must be fleeing or attempting to flee in order to entitle the party arresting him to a reward. *Wilkinson County v. Jones*, 52 So. 453 (Miss.

1910); *Board of Supvrs. v. Wright*, 111 Miss. 790, 72 So. 226 (1916).

The reward cannot be claimed for arresting one who after killing a person remained at home two days, not concealing himself and then left for another state remaining at one place till arrested, it being generally known where he was. *Rucker v. State*, 18 So. 121 (Miss. 1895).

Where one who has killed another is arrested in open day on a highway while going into the town of his residence, being near the business part of it, declaring at the time that he is on the way to surrender, the reward should not be allowed to the person making the arrest. *Board of Supvrs. v. Cottrel*, 70 Miss. 117, 12 So. 156 (1892).

### 4. Claim for reward; who liable.

The action of the circuit court reversing the action of the board of supervisors in disallowing a claim for reward is an allowance of the claim. *Ex parte Webb*, 96 Miss. 8, 49 So. 567 (1909).

The county does not have to be made a party defendant to a proceeding for reward under this section [Code 1942, § 2482]. *Ex parte Webb*, 96 Miss. 8, 49 So. 567 (1909).

In case of injury in one county resulting in death in another, the reward is payable by the county in which the cause of death was inflicted and not by the county where the death occurred. *Board of Supvrs. v. Wells*, 67 Miss. 151, 6 So. 614 (1889).

## RESEARCH REFERENCES

**ALR.** Knowledge of reward as condition of right thereto. 86 A.L.R.3d 1142.

**Am Jur.** 67 Am. Jur. 2d, Rewards §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Re-

wards, Forms 1-5, (complaint, petition, or declaration to recover reward).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

## § 99-3-37. Reward for arrest and delivery of fleeing killer; sheriff and other officers may receive.

The sheriff or other officers who shall arrest anyone who kills another and is fleeing, or attempting to flee, shall be entitled to the reward provided for in Section 99-3-35 the same as other persons, provided the killing is not done in the county in which the officer making the arrest resides. But the court adjudging such award to be due may, in its discretion, order the reward to be

divided equally between the officer making the arrest and any person or persons, giving him information leading to such arrest.

**SOURCES:** Codes, Hemingway's 1917, § 1217; Laws, 1930, § 1240; Laws, 1942, § 2483; Laws, 1910, ch. 187.

**Cross References** — Reward for arrest and delivery of fleeing killer, see § 99-3-35.

Reward for information leading to apprehension of any person subsequently convicted of any crime or misdemeanor committed in the state, see § 99-3-39.

## RESEARCH REFERENCES

**Am Jur.** 67 Am. Jur. 2d, Rewards §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 1-5, (complaint, petition, or declaration to recover reward).

21 Am. Jur. Pl & Pr Forms (Rev), Re-

wards, Forms 7-12, (instructions to jury pertaining to rewards).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

## § 99-3-39. Rewards for information may be offered by counties and municipalities.

(1) Boards of supervisors of the various counties of this state and the governing authorities of the municipalities, may either separately or in conjunction with each other, within their discretion, offer monetary rewards, the amount of which shall be fixed by the aforesaid governing authorities, within their discretion, for information leading to the apprehension of any person subsequently convicted of any crime or misdemeanor committed within this state; information regarding the whereabouts of missing persons; the ascertaining or divulging of any information necessary or helpful for the governing or the tranquility of any municipality or county of this state or for any like purpose, provided said reward shall not exceed the sum of Fifteen Thousand Dollars (\$15,000.00) and provided further, that said reward shall not be paid to any law enforcement officer or any employee of the governing authority offering such reward or any member of the immediate family of either.

(2) The aforesaid rewards may be paid from the general fund of the respective counties or municipalities.

**SOURCES:** Codes, 1942, § 2482.5; Laws, 1966, ch. 313, §§ 1, 2; Laws, 1970, ch. 345, §§ 1, 2; Laws, 2007, ch. 513, § 1, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment substituted "Fifteen Thousand Dollars (\$15,000)" for "twenty-five hundred dollars (\$2500.00)" in (1).

**Cross References** — Reward for arrest and delivery of fleeing killer, see § 99-3-35. Officers entitled to statutory reward for arrest of fleeing homicides, see § 99-3-37.



## ATTORNEY GENERAL OPINIONS

Various municipal governing authorities may encourage the same type of citizen and community crime solving assistance as the private non-profit Crimestoppers program by directly offering monetary rewards, in their discretion, for information leading to the arrest and conviction of those responsible for committing crimes in their areas. Gunn, January 23, 1998, A.G. Op. #98-0020.

A municipality may not use general funds to make donations to a nonprofit

corporation such as Crimestoppers, a not for profit Mississippi corporation established to encourage citizens to provide tips and information which may assist in solving crimes; however, a municipality may encourage the same type of citizen and community crime solving assistance by directly offering monetary rewards in their discretion for information leading to the arrest and conviction of those persons responsible for committing crimes. Pritchard, Sept. 7, 2001, A.G. Op. #01-0512.

## RESEARCH REFERENCES

**ALR.** Knowledge of reward as condition of right thereto. 86 A.L.R.3d 1142.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution-modern cases. 80 A.L.R.4th 547.

**Am Jur.** 67 Am. Jur. 2d, Rewards §§ 1 et seq.

16 Am. Jur. Legal Forms 2d, Rewards, §§ 225:14 et seq., (offers of reward).

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 1-5, (complaint, petition, or declaration to recover reward).

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 7-12, (instructions to jury pertaining to rewards).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

## CHAPTER 5

### Bail

SEC.

- 99-5-1. Form of bail; professional and soliciting bail agents to provide certain additional information; penalties.
- 99-5-3. Form of bail; taken in open court by entry on minutes.
- 99-5-5. Bonds to be made payable to state; effect; expiration and renewal.
- 99-5-7. Fidelity or surety insurance company may give bail.
- 99-5-9. Cash bail bond.
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- 99-5-13. Court may require additional bail.
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- 99-5-17. Sheriff to return bail-bond to clerk.
- 99-5-19. Person who takes insufficient bail-bond, etc., to stand special bail.
- 99-5-21. Bond good though it does not describe offense.
- 99-5-23. Bonds, recognizances, etc., to be valid and binding whether or not properly taken or recited in return of officer.
- 99-5-25. Forfeiture of bond; scire facias.
- 99-5-27. Sureties may arrest and surrender principal; return of defendant out on bond.
- 99-5-29. Surety may cause arrest of principal by officer.
- 99-5-31. Mittimus in bailable cases to fix the bail.
- 99-5-33. Accused committed to prison if injured party is dangerously wounded.
- 99-5-35. When prisoner charged with capital offense entitled to bail.
- 99-5-37. Domestic violence; required appearance before judge; considerations; conditions.
- 99-5-39. Appearance bond as condition of any court ordered supervision; defendant's failure to appear as grounds for forfeiture of bond.

#### **§ 99-5-1. Form of bail; professional and soliciting bail agents to provide certain additional information; penalties.**

Bail may be taken in the following form, viz.:

"State of Mississippi,

\_\_\_\_\_ County.

We \_\_\_\_\_, principal, and \_\_\_\_\_ and \_\_\_\_\_, sureties, agree to pay the State of Mississippi \_\_\_\_\_ Dollars, unless the said \_\_\_\_\_ shall appear at the next term of the Circuit Court of \_\_\_\_\_ County, and there remain from day to day and term to term until discharged by law, to answer a charge of \_\_\_\_\_.

Signed \_\_\_\_\_

Approved \_\_\_\_\_.

\_\_\_\_\_".

When the bail is for appearance before any committing court or a judge, the form may be varied to suit the condition.

When a bond is taken from a professional bail agent, the following must be preprinted or stamped clearly and legibly on the bond form: full name of the

professional bail agent, Department of Insurance license number, full and correct legal address of the professional bail agent and complete phone number of the professional bail agent. In addition, if the bond is posted by a limited surety professional bail agent, the name of the insurer, the legal address of the insurer on file with the department and phone number of the insurer must be preprinted or stamped, and a true and correct copy of an individual's power of attorney authorizing the agent to post such bond shall be attached.

If the bond is taken from a soliciting bail agent, the full name of the soliciting bail agent and the license number of such agent must be preprinted or stamped clearly and legibly along with all information required for a professional bail agent and a true and correct copy of an individual's power of attorney authorizing such soliciting bail agent to sign the name of the professional bail agent.

Any professional bail agent and/or soliciting bail agents who issue a bail bond that does not contain this required information may have their license suspended up to six (6) months and/or be fined not more than One Thousand Dollars (\$1,000.00) for the first offense, may have their license suspended up to one (1) year and/or be fined not more than Five Thousand Dollars (\$5,000.00) for the second offense and shall have their license permanently revoked if they commit a third offense.

**SOURCES:** Codes, 1880, § 3047; 1892, § 1400; Laws, 1906, § 1472; Hemingway's 1917, § 1230; Laws, 1930, § 1252; Laws, 1942, § 2495; Laws, 2007, ch. 390, § 1, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment added the last three paragraphs.

**Cross References** — Excessive bail prohibited; revocation or denial of bail, see Miss. Const., Art. 3, § 29.

Applicability of general bail provisions to the Mississippi Code of Military Justice, see § 33-13-623.

Deposit of driver's license in lieu of bail in traffic cases, see § 63-9-25.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-25.

Form of bail, see Miss. Unif. Cir. & County Ct. Prac. R. 6.02.

## JUDICIAL DECISIONS

### 1. Variance of bail agreement.

A surety was liable under a bail bond in light of the adjustment of the bail agreement in open court by the agent for the surety where (1) the bail agreement originally secured the defendant's justice court appearance on a charge of grand larceny, (2) the defendant appeared in

justice court and his case was bound over for consideration by the grand jury, (3) the agent for the surety then modified the bond to reflect that it was returnable to both justice court and circuit court, and (4) the defendant thereafter failed to appear in circuit court. *State v. Brooks*, 781 So. 2d 929 (Miss. Ct. App. 2001).

## RESEARCH REFERENCES

**ALR.** Propriety of applying cash bail to payment of fine. 42 A.L.R.5th 547.

Propriety, after obligors on appearance bond have been exonerated pursuant to



Rule 46(f) of the Federal Rules of Criminal Procedure, of applying cash or other security to fine imposed on accused. 58 A.L.R. Fed. 676.

**Am Jur.** 3 Am. Jur. Legal Forms 2d, Bail and Recognizance, §§ 35:35 et seq., (bail bonds and recognizances).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Form 1, (general form of undertaking).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 11 et seq., (amount of bail).

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 1:2.

Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Manual (Michie).

### § 99-5-3. Form of bail; taken in open court by entry on minutes.

Bail taken in open court may be entered on the minutes as follows, to wit:

"The State

No. \_\_\_\_\_ v.

A. B.

"Came the said A. B. and C. D. and E. F. and agreed to pay the state of Mississippi \_\_\_\_\_ dollars, unless the said A. B. shall appear at the present term of this court, and remain from day to day, and from term to term until discharged by law, to answer a charge of \_\_\_\_\_."

**SOURCES:** Codes, 1880, § 3049; 1892, § 1400a; Laws, 1906, § 1473; Hemingway's 1917, § 1231; Laws, 1930, § 1253; Laws, 1942, § 2496.

**Cross References** — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

Inapplicability of Mississippi Rules of Evidence in proceedings with respect to release on bail, see Miss. R. Evid. 1101.

### RESEARCH REFERENCES

**Am Jur.** 4 Am. Jur. Pl & Pr Forms (undertaking to insure appearance at contempt hearing), Bail and Recognizance, Form 2,

### § 99-5-5. Bonds to be made payable to state; effect; expiration and renewal.

All bonds and recognizances taken for the appearance of any party, either as defendant, prosecutor, or witness in any criminal proceeding or matter, shall be made payable to the state, and shall have the effect to bind the accused and his sureties on the bond or recognizance until the principal shall be discharged

by due course of law, and shall be in full force, from term to term, for a period of three (3) years, except that a bond returnable to the Supreme Court shall be in full force for a period of five (5) years. If it is necessary to renew a bond, it shall be renewed without additional premium. At the end of the applicable period, a bond or recognizance that is not renewed shall expire and shall be uncollectible unless the collection process was started on or before the expiration date of such bond or recognizance. Any bond or recognizance taken prior to July 1, 1996, shall expire on July 1, 1999. If a defendant is charged with multiple counts in one (1) warrant only one (1) bond shall be taken.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 2(57); 1857, ch. 64, art. 291; 1871, § 2791; 1880, § 3040; 1892, § 1393; Laws, 1906, § 1465; Hemingway's 1917, § 1223; Laws, 1930, § 1245; Laws, 1942, § 2488; Laws, 1996, ch. 450, § 1; Laws, 1997, ch. 346, § 1, eff from and after July 1, 1997.

**Cross References** — Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

## JUDICIAL DECISIONS

### 1. In general.

A provision of a state bail statute whereby an accused may obtain his pre-trial release by depositing with the court clerk 10 percent of the amount of bail, but upon performance of the conditions of the bail bond, the clerk returns only 90 percent of a deposit, retaining as bail bond costs 10 percent or one percent of the amount of bail, where other statutory provisions authorize release on personal recognizance, or on deposit of the full amount of bail or security, no retention of administrative charge being imposed in such situations, is not violative of equal protection as being imposed on the poor and not on the affluent, since it will not be presumed that the provision for release on personal recognizance is not utilized by state judges and made available for the poor, and it is not clear that the provision for deposit of the full amount of bail, with no retention charge, is for the affluent, who may find the 10 percent deposit provision just as attractive. *Schilb v. Kuebel*, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d

502 (1971), reh'g denied, 405 U.S. 948, 92 S. Ct. 930, 30 L. Ed. 2d 818 (1972).

Bastardy proceeding being in nature of criminal proceeding as respects defendant's arrest and binding over to appear before court, his appearance bond required him to appear at next term of court and there remain from day to day and term to term until discharged by law. *Boggan v. Davis*, 171 Miss. 307, 157 So. 904 (1934).

The obligation of the sureties is not affected by the subsequent arrest of their principal upon another charge, there being no actual custody to prevent his appearance as required by the bond. *Tedford v. State*, 67 Miss. 363, 7 So. 352 (1890).

The presence of the accused for trial does not relieve the sureties nor does his arraignment and trial. *Lee v. State*, 51 Miss. 665 (1875).

A recognizance or bail bond is not void for a mistake in it in relation to the time of the holding of the term of court in which it is returnable. *Curry v. State*, 39 Miss. 511 (1860).

## ATTORNEY GENERAL OPINIONS

Only one bond should be taken when a defendant is charged with multiple counts in one warrant; however, if separate war-

rants are issued for felony and misdemeanor offenses or separate affidavits are filed for each offense, then a separate bond

may be taken for the separate offenses. Walters, Sept. 28, 2001, A.G. Op. #01-0619.

## RESEARCH REFERENCES

**ALR.** Discharge, suspension, or remission of bail by reason of imprisonment of principal for a different offense. 4 A.L.R.2d 440.

Right to apply cash bail to payment of fine. 92 A.L.R.2d 1084.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond. 18 A.L.R.3d 1354.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release. 78 A.L.R.3d 780.

Bail: duration of surety's liability on pretrial bond. 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond. 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 A.L.R.4th 1192.

## § 99-5-7. Fidelity or surety insurance company may give bail.

Bail may be given to the sheriff or officer holding the defendant in custody, by a fidelity or surety insurance company authorized to act as surety within the State of Mississippi. Any such company may execute the undertaking as surety by the hand of officer or attorney authorized thereto by a resolution of its board of directors, a certified copy of which, under its corporate seal, shall be on file with the clerk of the circuit court and the sheriff of the county, and such authority shall be deemed in full force and effect until revoked in writing by notice to said clerk and sheriff.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; Laws, 1906, § 1463; Hemingway's 1917, § 1221; Laws, 1930, § 1243; Laws, 1942, § 2486; Laws, 1960, ch. 267.

**Cross References** — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

Cash bailbond, see § 99-5-9.

Approval of sureties, see § 99-5-15.

## JUDICIAL DECISIONS

### 1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in

proper cases. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158 (1950).



## RESEARCH REFERENCES

**ALR.** Propriety of applying cash bail to payment of fine. 42 A.L.R.5th 547.

### § 99-5-9. Cash bail bond.

(1) In addition to any type of bail allowed by statute, any committing court, in its discretion, may allow any defendant, to whom bail is allowable, to deposit cash as bail bond in lieu of a surety or property bail bond, by depositing such cash sum as the court may direct with the sheriff or officer having custody of defendant, who shall receipt therefor and who shall forthwith deliver the said monies to the county treasurer, who shall receipt therefor in duplicate. The sheriff, or other officer, upon receipt of the county treasurer, shall forthwith deliver one (1) copy of such receipt to the committing court who shall then order the release of such defendant.

(2) The order of the court shall set forth the conditions upon which such cash bond is allowed and shall be determined to be the agreement upon which the bailee has agreed.

(3) The sums received by the county treasurer shall be deposited by him in a special fund to be known as "Cash Bail Fund," and shall be received by him subject to the terms and conditions of the order of the court.

(4) If the committing court authorizes bail by a cash deposit under subsection (1) of this section, but anyone authorized to release a criminal defendant allows the deposit of an amount less than the full amount of the bail ordered by the court, the defendant may post bail by a professional bail agent in an amount equal to one-fourth ( $\frac{1}{4}$ ) of the full amount fixed under subsection (1) or the amount of the actual deposit whichever is greater.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; Laws, 1906, § 1463; Hemingway's 1917, § 1221; Laws, 1930, § 1243; Laws, 1942, § 2486; Laws, 1960, ch. 267; Laws, 2007, ch. 390, § 2, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment designated the previously existing paragraphs as (1) through (3); and added (4).

**Cross References** — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

Fidelity or surety insurance company may give bail, see § 99-5-7.

Court may require additional bail, see § 99-15-13.

## JUDICIAL DECISIONS

#### 1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in

proper cases. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

## ATTORNEY GENERAL OPINIONS

If cash bond is tendered in proper amount, it must be accepted; officials of county jail where town houses its prisoners may not refuse to accept cash bonds on city prisoners. Bond, Nov. 25, 1992, A.G. Op. #92-0834.

A defendant charged with a non-traffic offense may be allowed by the court to post a cash bond and sign an agreement that would allow the cash bond to be used

to pay any fine that might be imposed against the defendant as a result of a trial in absentia should the defendant fail to appear; however, such an agreement would in no way relieve the defendant of the obligation to appear for trial, but would merely offer the court an additional option to collect a fine should the defendant fail to appear. Shirley, May 1, 2000, A.G. Op. #2000-0197.

## RESEARCH REFERENCES

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 61 et seq.      **CJS.** 8 C.J.S., Bail §§ 71, 72.

### § 99-5-11. Justices of the peace may take recognizance or bond; certificate of default; alias warrant.

All justices of the peace and all other conservators of the peace are authorized, whenever a person is brought before them charged with any offense not capital for which bail is allowed by law, to take the recognizance or bond of such person, with sufficient sureties, in such penalty as the justice or conservator of the peace may require, for his appearance before such justice or conservator for an examination of his case at some future day. And if the person thus recognized or thus giving bond, fail to appear at the appointed time, it shall be the duty of the justice or conservator to return the recognizance or bond, with his certificate of default, to the court having jurisdiction of the case, and a recovery may be had therein by scire facias, as in other cases of forfeiture. The justice or other conservator shall also issue an alias warrant for the defaulter.

**SOURCES:** Codes, 1871, § 2874; 1880, § 3044; 1892, § 1397; Laws, 1906, § 1469; Hemingway's 1917, § 1227; Laws, 1930, § 1249; Laws, 1942, § 2492.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

## JUDICIAL DECISIONS

### 1. In general.

An indigent defendant charged with aggravated assault and unable to make bail was improperly denied release on her own recognizance where the record was devoid of any consideration by the judicial officer

of alternative forms of release and where there was no evidence that there was a substantial risk of nonappearance. On remand to consider whether a form of pre-trial release other than money bail would adequately assure defendant's presence at

trial, the ABA minimum standards relating to pretrial release would serve as a guide to the judicial officer in making the release decision. *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979).

This statute apparently applies only to instances where the accused has already

been charged with an offense, and not to cases where no charge is then pending and no warrant has been issued. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

### ATTORNEY GENERAL OPINIONS

Justice court judge may order constable to release defendant upon defendant's execution of recognizance bond; when such is done defendant would not be placed in

county jail and would not need to pay attendant fees. *O'Brien* Oct. 13, 1993, A.G. Op. #93-0701.

### RESEARCH REFERENCES

**ALR.** Pretrial preventive detention by state court. 75 A.L.R.3d 956.

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 5 et seq.

**CJS.** 8 C.J.S., Bail § 61.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

### § 99-5-13. Court may require additional bail.

When it shall appear to the court before which any person charged with a criminal offense has given bail to appear that such bail is insufficient in any respect, the court may order the issuance of process for the arrest of such person, and may require him to give bail as may be ordered, and, in default thereof, may commit him to jail as in other cases.

**SOURCES:** Codes, 1880, § 3051; 1892, § 1402; Laws, 1906, § 1475; Hemingway's 1917, § 1233; Laws, 1930, § 1255; Laws, 1942, § 2498.

### RESEARCH REFERENCES

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 65 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 12, 14, 16, (increase of bail).

**CJS.** 8 C.J.S., Bail § 70.

### § 99-5-15. Duty of officer to release defendant from custody; approval of sureties.

It is the duty of the sheriff or other officer having custody of such defendant, upon his compliance with the order of the committing court or officer, to release him from custody; and he shall approve the sureties on the bond, except admitted and authorized fidelity and surety insurance companies acting as surety, and for that purpose may examine them on oath, or take their affidavit in writing, and may administer such oath.



**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; Laws, 1906, § 1463; Hemingway's 1917, § 1221; Laws, 1930, § 1243; Laws, 1942, § 2486; Laws, 1960, ch. 267.

**Cross References** — Fidelity or surety insurance company may give bail, see § 99-5-7.

## JUDICIAL DECISIONS

### 1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in

proper cases. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

## ATTORNEY GENERAL OPINIONS

In all personal surety bonds, the sheriff is vested with great discretion to approve or not approve the bond. *Thompson*, Mar. 11, 1992, A.G. Op. #92-0119.

A sheriff may require a professional bail agent acting as a personal surety agent to furnish a financial statement, list of assets or some other documentation to show that the bail agent is solvent and has the ability to meet the obligation of the bond and, if a bail agent refuses to provide proof of solvency, the sheriff may refuse to approve bonds from that bail agent; however, this requirement does not apply to a limited surety agent representing an authorized fidelity and surety insurance company. *Dykes*, Feb. 15, 2002, A.G. Op. #02-0044.

In addition to this section, §§ 19-25-67 and 99-33-7 give a sheriff the authority to take or approve bonds. *Tolar*, Oct. 31, 2003, A.G. Op. 03-0571.

A sheriff may not exclude all personal surety bail bondsmen from writing bonds with the county for persons charged with felonies and accept only bonds submitted

by authorized fidelity and surety insurance companies. *Grimmett*, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff may require a bondsman to furnish a financial statement, list of assets or some other documentation to show that the bondsman is solvent and has the ability to meet the obligation of the bond. If a bondsman refuses to provide proof of solvency, the sheriff may refuse to approve bonds from that bondsman. *Grimmett*, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff cannot act in an arbitrary and capricious fashion when approving or rejecting bail bonds and should be able to articulate the reason why a bond was refused. *Grimmett*, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff does not have authority to require insurance of bonding companies doing business with the sheriff's department. The sheriff may refuse to approve the bond of a bondsman whom the sheriff has found to be insolvent, to have insufficient assets or to be in default. *Haywood*, Oct. 29, 2004, A.G. Op. 04-0547.

## RESEARCH REFERENCES

**ALR.** Modern status of rules and standards in state courts as to adequacy of

defense counsel's representation of criminal client. 2 A.L.R.4th 27.

### § 99-5-17. Sheriff to return bail-bond to clerk.

It is the duty of the sheriff taking a bail-bond to return the same to the clerk of the circuit court of the county in which the offense is alleged to have been committed on or before the first day of the next term thereof.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(3); 1857, ch. 64, art. 289; 1871, § 2789; 1880, § 3039; 1892, § 1392; Laws, 1906, § 1464; Hemingway's 1917, § 1222; Laws, 1930, § 1244; Laws, 1942, § 2487.

## **§ 99-5-19. Person who takes insufficient bail-bond, etc., to stand special bail.**

If any person, except a properly authorized judge, authorized to release a criminal defendant neglects to take a bail bond, or if the bail bond from any cause is insufficient at the time he took and approved the same, on exceptions taken and filed before the close of the next term, after the same should have been returned, and upon reasonable notice thereof to the person, he shall stand as special bail, and judgment shall be rendered against him as such, except when bond is tendered by a fidelity or insurance company or professional bail agent or its bail agent authorized by Mississippi state license to act as bail surety. The person taking and approving a bail bond from a fidelity or insurance company or professional bail agent or its bail agent with a valid Mississippi state license shall bear no financial liability on the bail bond in the event of a bail bond forfeiture or default.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(3); 1857, ch. 64, art. 289; 1871, § 2789; 1880, § 3039; 1892, § 1392; Laws, 1906, § 1464; Hemingway's 1917, § 1222; Laws, 1930, § 1244; Laws, 1942, § 2487; Laws, 1997, ch. 335, § 1; Laws, 2004, ch. 363, § 2, eff from and after July 1, 2004.

## **JUDICIAL DECISIONS**

### **1. In general.**

This section, which provides that determination as to need for bail bond or propriety of personal recognizance release is vested in discretion of judicial officer, and that once bail has been set duty to review adequacy of bondsmen is left to sheriff,

who must satisfy himself as to reliability of surety or stand personally liable for amount of bond should surety prove insufficient, does not violate Eighth Amendment. *Williams v. Farrior*, 626 F. Supp. 983 (S.D. Miss. 1986).

## **ATTORNEY GENERAL OPINIONS**

Sheriff may refuse to approve a bond if surety is not sufficient; type of offense, whether felony or misdemeanor, should make no difference in approving bond. *Brewer*, Oct. 7, 1992, A.G. Op. #92-0532.

Once justice court judge issues mittimus to sheriff setting forth amount of bail and number of sureties required, sheriff can only release defendant when bond or other conditions set by judge have been fully satisfied and failure of sheriff to comply with mittimus could result in sheriff standing as special bail and having judgment rendered against him. *Vess*, March 18, 1994, A.G. Op. #94-0124.

As a result of the 1997 and 2004 amendments to this section the sheriff has no personal liability if the bond is taken and approved from one of the named entities. A professional bail agent is either "a licensed personal surety agent" acting without an insurer or is "a limited surety agent representing an insurer." The use of either in taking and approving a bond would negate liability on the part of the sheriff. *McWilliams*, Nov. 15, 2004, A.G. Op. 04-0552.

**§ 99-5-21. Bond good though it does not describe offense.**

All bonds and recognizances taken in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer to such offense as he may have actually committed, and shall be valid for that purpose until he be discharged by the court.

**SOURCES:** Codes, 1857, ch. 64, art. 368; 1871, § 2873; 1880, § 3042; 1892, § 1395; Laws, 1906, § 1467; Hemingway's 1917, § 1225; Laws, 1930, § 1247; Laws, 1942, § 2490.

**JUDICIAL DECISIONS**

**1. In general.**

A bond for the appearance for the defendant to answer the charge of robbery is good for the appearance of the defendant on a charge of grand larceny where the indictment grew out of the offense intended to be described in the bond. *Smith*

*v. State*, 86 Miss. 315, 38 So. 319 (1905); *Allen v. State*, 110 Miss. 384, 70 So. 362 (1915).

A mistake does not render a bond invalid, a scire facias can be amended if necessary to show the facts. *Curry v. State*, 39 Miss. 511 (1860).

**RESEARCH REFERENCES**

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance § 54.

**§ 99-5-23. Bonds, recognizances, etc., to be valid and binding whether or not properly taken or recited in return of officer.**

All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court or officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it was taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not.

It shall not be an objection to any bail-bond or recognizance that it is in the form of an acknowledgment before a court or officer and is without the signature of any person, or is without the indorsement of approval by any officer; but all persons who, by their acknowledgment before any officer of liability to pay a sum of money to the state if some person shall not appear before some court or officer in a criminal prosecution, procure the discharge from custody of such person, shall be bound accordingly upon the recognizance. An obligation signed by a person to obtain the discharge from custody of another shall not be invalid, if it have that effect, because it does not have indorsed on it the approval of any officer, or because the taking thereof be not recited in the return of the officer.



**SOURCES:** Codes, 1880, §§ 3041, 3050; 1892, §§ 1394, 1401; Laws, 1906, §§ 1466, 1474; Hemingway's 1917, §§ 1224, 1232; Laws, 1930, §§ 1246, 1254; Laws, 1942, §§ 2489, 2497.

## JUDICIAL DECISIONS

### 1. In general.

This section [Code 1942, § 2489] is based on the assumption that the principal in the bail bond is lawfully in custody and has no application where there is an absolute want of power in the officer who arrested the principal in the bail bond to so do and who exacted the bond before he would release the principal therein from custody, and, accordingly, the arrest of one on a warrant issued by a circuit clerk was illegal and the bond under which he was set at liberty is void. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

This section [Code 1942, § 2489] makes valid a bond erroneously accepted by the arresting officer after serving a warrant issued by a justice of the peace in a bastardy case in so far as an action against the sureties on the bond is concerned, since the effect of the bond and the execution of the bond availed to set the accused free from the legal custody of the arresting officer and the party so procuring is released from legal custody of any sort so

that the sureties on his bond cannot thereafter deny the validity thereof because the sheriff was required to keep him in custody and deliver his person into the court of the justice of the peace. *Boykin v. West*, 183 Miss. 567, 184 So. 624 (1938).

If a bond served to release the principal on the charge the sureties are bound by the bond although the offense may be erroneously described. *Allen v. State*, 110 Miss. 384, 70 So. 362 (1915).

Judgment nisi should not be taken against the sureties on a bond for the accused's failure to appear and answer an entirely different charge. *McCaleb v. State*, 96 Miss. 144, 50 So. 555 (1909).

Where a justice of the peace bound a defendant over to appear before the circuit court to await the action of the grand jury on the charge of having committed a misdemeanor, the bond is void notwithstanding this section [Code 1942, § 2489] since there was not power in the justice of the peace to take such bond. *Smith v. State*, 86 Miss. 315, 38 So. 319 (1905).

## RESEARCH REFERENCES

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 54 et seq.

## ATTORNEY GENERAL OPINIONS

A Mississippi court may issue a "hold order" to the sheriff of another Mississippi county, and, in such cases, the bail will be

entitled to a refund. *Perry*, May 26, 2000, A.G. Op. #2000-0248.

**CJS.** 8 C.J.S., Bail §§ 73 et seq.

## § 99-5-25. Forfeiture of bond; scire facias.

(1)(a) If a defendant in any criminal case, proceeding, or matter, fails to appear for any proceeding as ordered by the court, then the court shall order the bail forfeited and a bench warrant issued at the time of nonappearance. The purpose of bail is to guarantee appearance and bail shall not be forfeited for any other reason. Upon declaration of such forfeiture, the court shall issue a judgment nisi. The clerk of the court shall notify the surety of the forfeiture by writ of scire facias, with a copy of the judgment nisi and bench warrant attached thereto, within ten (10) working days of such order of

judgment nisi either by personal service or by certified mail. Failure of the clerk to provide the required notice within ten (10) working days shall constitute prima facie evidence that the order should be set aside.

(b) The judgment nisi shall be returnable for ninety (90) days from the date of issuance. If during such period the defendant appears before the court, or is arrested and surrendered, then the judgment nisi shall be set aside. If the surety fails to produce the defendant and does not provide to the court reasonable mitigating circumstances upon such showing, then the forfeiture shall be made final with a copy of the final judgment to be served on the surety. Reasonable mitigating circumstances shall be that the defendant is incarcerated in another jurisdiction, that the defendant is hospitalized under a doctor's care, that the defendant is in a recognized drug rehabilitation program, that the defendant has been placed in a witness protection program and it shall be the duty of any such agency placing such defendant into a witness protection program to notify the court and the court to notify the surety, or any other reason justifiable to the court.

(2) If a final judgment is entered against a surety licensed by the Department of Insurance and has not been set aside after ninety (90) days, or later if such time is extended by the court issuing the judgment nisi, then the court shall order the department to revoke the authority of such surety to write bail bonds. The commissioner shall, upon notice of the court, notify said surety within five (5) working days of receipt of revocation. If after ten (10) working days of such notification the revocation order has not been set aside by the court, then the commissioner shall revoke the authority of the surety and all agents of the surety and shall notify the sheriff of every county of such revocation.

(3) If within twelve (12) months of the date of the final forfeiture the defendant appears for court, is arrested or surrendered to the court, or if the defendant is found to be incarcerated in another jurisdiction and a hold order placed on the defendant, then the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 5; 1857, ch. 64, art. 292; 1880, § 3043; 1892, § 1396; Laws, 1906, § 1468; Hemingway's 1917, § 1226; Laws, 1930, § 1248; Laws, 1942, § 2491; Laws, 1996, ch. 317, § 1; Laws, 1999, ch. 428, § 1; Laws, 2001, ch. 547, § 1, eff from and after July 1, 2001.

**Cross References** — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

## JUDICIAL DECISIONS

1. In general.
2. Service of scire facias.
3. Amendment of scire facias.
4. Entry of judgment final.
5. Relief of sureties.

### 1. In general.

Trial court did not err in ordering defendant's arrest and reincarceration after defendant had been released on bond on a charge of aggravated assault but failed to

appear for arraignment on the charge. *Ray v. State*, 844 So. 2d 483 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

The rule announced in previous cases that a forfeiture judgment is properly entered against the sureties of a defendant who fails to appear for trial due to his incarceration in another jurisdiction is overruled insofar as professional bondsmen are concerned, thus making the decisions in those cases applicable only to non-professional bondsmen. *Wood v. State*, 345 So. 2d 616 (Miss. 1977).

A bail bondsman is entitled to an extension of time delaying final judgment when he can establish to the court's satisfaction that the defendant is in the lawful custody of another jurisdiction and previous cases which hold otherwise are overruled. *Wood v. State*, 345 So. 2d 616 (Miss. 1977).

The illness of a defendant which prevents his appearance in court as required by the condition of his bail bond is an Act of God for which no forfeiture should be taken against his surety. *United Bonding Ins. Co. v. State*, 252 Miss. 428, 175 So. 2d 182 (1965).

## 2. Service of scire facias.

Issuance and "not found" return of second scire facias must be accomplished five days before return day, and failure to comply with this requirement rendered final judgment void for lack of process. *Resolute Ins. Co. v. State*, 308 So. 2d 924 (Miss. 1975).

The service of a scire facias on a forfeited bail bond must be served on the sureties before the return day of the summons. *Robertson v. State*, 87 Miss. 285, 39 So. 478 (1905).

Two returns of "not found" on a writ of scire facias is by the statute made equal to the service of the same, but it does not make service or such returns as to all the parties a prerequisite to judgment final against those who are served. *Saffold v. State*, 60 Miss. 928 (1883).

## 3. Amendment of scire facias.

The scire facias can be amended. *Curry v. State*, 39 Miss. 511 (1860); *Tucker v. State*, 55 Miss. 452 (1877).

## 4. Entry of judgment final.

A proceeding to make final a judgment nisi is a civil action and not criminal.

*Washington v. State*, 98 Miss. 150, 53 So. 416 (1910).

Where the scire facias is not supported in a material particular by the judgment nisi a judgment final inconsistent with the judgment nisi is erroneous. *Smith v. State*, 76 Miss. 728, 25 So. 491 (1899).

Two returns of "not found" on a writ of scire facias is by the statute made equal to the service of the same, but it does not make service or such returns as to all the parties a prerequisite to judgment final against those who are served. *Saffold v. State*, 60 Miss. 928 (1883).

If judgment final have been taken by default on a scire facias, a variance between the bond and the scire facias will not avail on appeal. *Ditto v. State*, 30 Miss. 126 (1855); *Saffold v. State*, 60 Miss. 928 (1883).

It is not error to enter judgment by default on a scire facias to enforce a judgment nisi while there is a plea to the indictment undisposed of. *Ditto v. State*, 30 Miss. 126 (1855).

## 5. Relief of sureties.

Forfeiture of a pretrial bond was not proper under this section and the surety was entitled to recover its bond where, after conviction, the defendant was released on the existing bond plus an additional bond, but the surety was not notified nor did he accept a new obligation for posttrial bond. *Frontier Ins. Co. v. State*, 741 So. 2d 1021 (Miss. Ct. App. 1999).

The release of sureties on a bail bond from liability thereon is not within the discretion of the courts; they being authorized to grant such relief only when a legal right thereto has been made to appear. *Nix v. State*, 213 So. 2d 554 (Miss. 1968), overruled on other grounds, *Wood v. State*, 345 So. 2d 616 (Miss. 1977); *Stewart v. State*, 150 Miss. 545, 117 So. 533 (1928).

Where pursuant to a court order of commitment, secured at the instance of the attorneys for the accused and principal obligor on the bail bond, the sheriff carried the accused to the state hospital for a sanity examination, and subsequently the accused was found sane and released from the institution, but failed to appear for trial, the order of commitment did not relieve the sureties on the bail bond since there was no arrest of the



accused for the same or other crime, or any interference with the custody of the sureties such as the law could regard as

an excuse for the failure of the accused to appear for trial. *Hall v. State*, 231 Miss. 767, 97 So. 2d 649 (1957).

### ATTORNEY GENERAL OPINIONS

Under this section, once a scire facias has been returned to the court, and lacking a sufficient showing of cause, a final judgment may be entered against the surety for the forfeiture of bond. A final judgment may be enforced the same as any other judgment, including attachments, executions and garnishments. *Schmidt*, May 31, 1996, A.G. Op. #96-0328.

This section prescribes the procedure for forfeiture of bail bonds. The bond is due at the time final judgment is entered. *Perry*, August 23, 1996, A.G. Op. #96-0558.

A scire facias may be personally served on a limited surety agent, and that process will be binding on the insurer represented by that agent. *Johnson*, November 6, 1998, A.G. Op. #98-0672.

The statute authorizes a court to order bail forfeited any time a defendant fails to appear for any proceeding as ordered by the court; if the defendant fails to appear for the scheduled trial of a non-traffic offense, he may be tried in his absence and sentenced accordingly; however, there must be enough evidence presented at the trial in absentia to support a conviction, and, if the prosecutor or witnesses do not appear, the defendant cannot be convicted. *Shirley*, May 1, 2000, A.G. Op. #2000-0197.

A municipality does not have the authority to require a bondsman to locate an office within the city limits in order to write bonds for municipal prisoners. *Lawrence, Jr.*, Feb. 8, 2002, A.G. Op. #02-0007.

Upon a bond forfeiture, the surety should be notified of the forfeiture by service of a scire facias along with a copy of the judgment nisi and bench warrant attached. The scire facias may be served either by personal service or by certified mail. Personal service upon the surety may be accomplished by personally delivering the scire facias to the professional bondsman. *Aldridge*, Sept. 24, 2004, A.G. Op. 04-0464.

Personal service of a scire facias may be performed by a constable, sheriff or deputy, or any other reputable person at least 18 years of age that the justice court clerk may appoint. This would include the clerk or a deputy clerk. Personal service could be accomplished by having the professional bondsman pick up the scire facias along with the judgment nisi and bench warrant or by having the clerk or deputy clerk deliver the scire facias and attachments to the professional bondsman. A proper return should be made to the court by the person serving the scire facias. *Aldridge*, Sept. 24, 2004, A.G. Op. 04-0464.

### RESEARCH REFERENCES

**ALR.** Appealability of order relating to forfeiture of bail. 78 A.L.R.2d 1180.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 A.L.R.4th 1192.

State statutes making default on bail a separate criminal offense. 63 A.L.R.4th 1064.

Forfeiture of bail for breach of conditions of release other than that of appearance. 68 A.L.R.4th 1082.

What is proper venue under Rule 18 of the Federal Rules of Criminal Procedure for offense of bail jumping. 52 A.L.R. Fed. 901.

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 109 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 111 et seq., (forfeiture proceedings).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 121 et seq., (vacation of forfeiture).

CJS. 8 C.J.S., Bail §§ 150, 152 et seq.

**§ 99-5-27. Sureties may arrest and surrender principal; return of defendant out on bond.**

(1)(a) “Surrender” means the delivery of the defendant, principal on bond, physically to the sheriff or chief of police or in his absence, his jailer, and it is the duty of the sheriff or chief of police, or his jailer, to accept the surrender of the principal when presented and such act is complete upon the execution of verbal or written surrender notice presented by bail and shall relieve bail of liability on principal’s bond.

(b) Bail may surrender principal if principal is found to be detained on another charge. If principal is found incarcerated in another jurisdiction, bail may surrender him by verbal or written notice of surrender to the sheriff or chief of police, or his jailer, of that jurisdiction and the notice of surrender shall act as a “Hold Order” and upon presentation of written surrender notice to the court of proper jurisdiction, the court shall order a “Hold Order” placed on the principal for the court and shall relieve bail of liability on principal’s bond, with the provision that, upon release from incarceration in the other jurisdiction, return of the principal to the sheriff shall be the responsibility of bail. Bail shall satisfy the responsibility to return a principal held by a “Hold Order” in another jurisdiction upon release from the other jurisdiction either by personally returning principal to the sheriff at no cost to the county or, where the other jurisdiction will not release principal to any person other than a law enforcement officer, by reimbursing to the county the reasonable cost of the return of principal, not to exceed the cost that would be entailed if the first option were available.

(c) The surrender of principal by bail, within the time period provided in Section 99-5-25, shall serve to discharge its liability to the State of Mississippi and any of its courts; but if this be done after forfeiture of the bond or recognizance, the court shall set aside the judgment nisi or final judgment upon filing of surrender notice by bail.

(2)(a) Bail, or its agent, at any time, may surrender its principal to any law enforcement agency or in open court in discharge of its liability on the principal’s bond if the law enforcement agency that was involved in setting the original bond approves of such surrender, to the State of Mississippi and any of its courts and at any time may arrest and transport its principal anywhere or may authorize another to do so, may be assisted by any law enforcement agency or its agents anywhere upon request of bail and may receive any information available to law enforcement or the courts pertaining to the principal for the purpose of safe surrender or for any reasonable cause in order to safely return the principal to the custody of law enforcement and the court.

(b) Bail, or its agent, at any time, may arrest its principal anywhere or authorize another to do so for the purpose of surrender of the principal on

bail bond. Failure of the sheriff or chief of police or his jailer, any law enforcement agency or its agents or the court to accept surrender by bail or its agent shall relieve bail of any liability on principal's bond, and the bond shall be held for naught.

(3) Bail, or its agent, at any time, upon request by the defendant or others on behalf of the defendant, may privately interview the defendant to obtain information to help with surrender before posting any bail bond on behalf of the defendant. All licensed bail agents shall have equal access to jails or detention facilities for the purpose of such interviews, the posting of bail bonds and the surrender of principal.

(4) Upon surrender, the court, after full review of the defendant and the pending charges, in open court, may discharge the prisoner on his giving new bail, but if he does not give new bail, he shall be detained in jail.

**SOURCES:** Codes, 1880, § 3045; 1892, § 1398; Laws, 1906, § 1470; Hemingway's 1917, § 1228; Laws, 1930, § 1250; Laws, 1942, § 2493; Laws, 1997, ch. 335, § 2; Laws, 1999, ch. 399, § 2, eff from and after July 1, 1999.

**Editor's Note** — The 1997 amendment rewrote this section, so as to provide for revised surrender procedures.

**Cross References** — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

## JUDICIAL DECISIONS

### 1. In general.

Bail bondsmen do not have authority to surrender a principal for civil debt. *Brooks v. Pennington*, — So. 2d —, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. May 29, 2007).

In cases where bail bondsmen attempt to surrender a principal, the following duties must be satisfied: (1) the sheriff or his agent must verify the identity of the defendant, that the defendant is in fact who the bondsman says he is; (2) the sheriff or his agent must verify the identity of the bondsman, and that the surrendering individual is in fact a licensed professional bondsman entitled to invoke Miss. Code Ann. § 99-5-27; and (3) the sheriff or his agent must use reasonable care to verify that the bond upon which the accused is being surrendered is presently valid and binding on the principal and surety. *Brooks v. Pennington*, — So. 2d —, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. May 29, 2007).

Bail bondsmen, who were looking to arrest a man for jumping bail, did not have the authority to search the man's

mother's home without a search warrant. *Milburn v. Vinson*, 850 So. 2d 1219 (Miss. Ct. App. 2002).

Trial court did not err in ordering defendant's arrest and reincarceration after defendant had been released on bond on a charge of aggravated assault but failed to appear for arraignment on the charge. *Ray v. State*, 844 So. 2d 483 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

The release of sureties on a bail bond from liability thereon is not within the discretion of the courts; they being authorized to grant such relief only when a legal right thereto has been made to appear. *Nix v. State*, 213 So. 2d 554 (Miss. 1968), overruled on other grounds, *Wood v. State*, 345 So. 2d 616 (Miss. 1977); *Stewart v. State*, 150 Miss. 545, 117 So. 533 (1928).

Where a defendant in criminal proceedings failed to appear and defaulted, but was surrendered by his sureties in open court before a final judgment of forfeiture of his bail bonds was entered, such surrender under the clear terms of Code 1942, § 2493, had the effect of discharg-



ing the surety's liability. *Resolute Ins. Co. v. State*, 233 So. 2d 788 (Miss. 1970).

Statutes authorizing sureties to arrest principal anywhere, or to authorize another to do so, are declaratory of common law. *Cartee v. State*, 162 Miss. 263, 139 So. 618 (1932).

Constable who, at surety's request, accompanied surety to another district to

accept surrender of principal, had duty and right of arresting principal. *Cartee v. State*, 162 Miss. 263, 139 So. 618 (1932).

In homicide prosecution against constable, refusal to instruct that it was constable's duty to accept surety's surrender of deceased principal held reversible error. *Cartee v. State*, 162 Miss. 263, 139 So. 618 (1932).

## ATTORNEY GENERAL OPINIONS

A private probation service does not have the same arresting authority that a bail bondsman has under this section. *Perry*, June 28, 1996, A.G. Op. #96-0399.

A Mississippi court may issue a "hold order" to the sheriff of another Mississippi county, and, in such cases, the bail will be entitled to a refund. *Perry*, May 26, 2000, A.G. Op. #2000-0248.

A bondsman may surrender his principal in accordance with the statute at any time, with or without cause, and relieve his obligation and liability to the court; specifically, a bondsman's surrender right is not limited to situations where the defendant is found detained in another jurisdiction. *Martin*, May 26, 2000, A.G. Op. #2000-0282.

When a defendant who is released on bond is found incarcerated in another jurisdiction, the bondsman may surrender the defendant by notifying the authorities that are holding the defendant that he wishes to surrender the defendant and

that a hold order is being requested; the bondsman should then present a written surrender notice to the court that has jurisdiction over the bond notifying the court of the defendant's incarceration in another jurisdiction and request the court to place a "hold order" on the defendant, and the court should then send a "hold order" to the authorities that have incarcerated the defendant; the bondsman's liability on the bond should then be released except for the costs of returning the defendant from the location of incarceration to the court with proper jurisdiction; the judge may prepare the "hold order" himself or direct the bondsman to prepare the "hold order" that is to be sent to the authorities holding the defendant; if a bondsman properly surrenders a defendant but the court fails to issue a "hold order" on the defendant, the bondsman should be released from his obligation on the bond and an arrest warrant may be issued for the defendant. *Aldridge*, Feb. 15, 2002, A.G. Op. #02-0046.

## RESEARCH REFERENCES

**ALR.** Bail: duration of surety's liability on pretrial bond. 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond. 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 A.L.R.4th 600.

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 80 et seq., 94 et seq.

3 Am. Jur. Legal Forms 2d, Bail and Recognizance, § 35:26, (provision of con-

tract for execution of bail bond as to surrender of principal).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 71 et seq., (voluntary surrender of principal).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 91, 92, (authorization by surety to arrest principal).

**CJS.** 8 C.J.S., Bail § 143.

**§ 99-5-29. Surety may cause arrest of principal by officer.**

The sheriff or a constable in a proper case, upon the request of a surety in any bond or recognizance, and tender of the legal fee for executing a capias in a criminal case, and the production of a certified copy of the bond of recognizance, shall arrest, within his county, the principal in the bond or recognizance. The surety or his agent shall accompany the officer to receive the person.

**SOURCES:** Codes, 1880, § 3046; 1892, § 1399; Laws, 1906, § 1471; Hemingway's 1917, § 1229; Laws, 1930, § 1251; Laws, 1942, § 2494.

**JUDICIAL DECISIONS**

**1. In general.**

Statutes authorizing sureties to arrest principal anywhere, or to authorize another to do so, are declaratory of common law. *Cartee v. State*, 162 Miss. 263, 139 So. 618 (1932).

Constable who, at surety's request, accompanied surety to another district to accept surrender of principal, had duty and right of arresting principal. *Cartee v. State*, 162 Miss. 263, 139 So. 618 (1932).

**RESEARCH REFERENCES**

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 80 et seq.

**CJS.** 8 C.J.S., Bail § 143.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 91, 92, (authorization by surety to arrest principal).

**§ 99-5-31. Mittimus inailable cases to fix the bail.**

When a defendant charged with a criminal offense shall be committed to jail by a court, judge, justice or other officer, for default in not giving bail, it is the duty of such court or officer to state in the mittimus the nature of the offense, the county where committed, the amount of bail, and number of sureties required, and to direct the sheriff of the county where such party is ordered to be confined to release him, on his entering into bond as required by the order of the court or committing officer; and this shall apply to a case where, on habeas corpus, an order for bail may be made.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 12(1); 1857, ch. 64, art. 287; 1871, § 2787; 1880, § 3037; 1892, § 1390; Laws, 1906, § 1462; Hemingway's 1917, § 1220; Laws, 1930, § 1242; Laws, 1942, § 2485.

**ATTORNEY GENERAL OPINIONS**

Once justice court judge issues mittimus to sheriff setting forth amount of bail and number of sureties required, sheriff can only release defendant when bond or other conditions set by judge have been

fully satisfied and failure of sheriff to comply with mittimus could result in sheriff standing as special bail and having judgment rendered against him. *Vess*, March 18, 1994, A.G. Op. #94-0124.

## RESEARCH REFERENCES

**ALR.** Insanity of accused as affecting right to bail in criminal case. 11 A.L.R.3d 1385.

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance §§ 1 et seq.

**CJS.** 8 C.J.S., Bail §§ 37 et seq.

**Lawyers' Edition.** Considerations affecting grant, continuance, reduction, or revocation of bail by individual Justice of Supreme Court. 30 L. Ed. 2d 952.

**§ 99-5-33. Accused committed to prison if injured party is dangerously wounded.**

If a person be dangerously wounded the party accused shall be committed to prison until it be known whether the person wounded will recover or not, unless it appear to the court of inquiry that the case, in any event, would not amount to murder; in which case, or in the event that the person wounded do or will recover, the accused shall be dealt with as in other cases.

**SOURCES:** Codes, 1857, ch. 64, art. 283; 1871, § 2783; 1880, § 3036; 1892, § 1389; Laws, 1906, § 1461; Hemingway's 1917, § 1219; Laws, 1930, § 1241; Laws, 1942, § 2484.

## RESEARCH REFERENCES

**ALR.** Pretrial preventive detention by state court. 75 A.L.R.3d 956.

**§ 99-5-35. When prisoner charged with capital offense entitled to bail.**

Any person having been twice tried on an indictment charging a capital offense, wherein each trial has resulted in a failure of the jury to agree upon his guilt or innocence, shall be entitled to bail in an amount to be set by the court.

**SOURCES:** Codes, 1942, § 2485.5; Laws, 1966, ch. 382, § 1, eff from and after passage (approved June 15, 1966).

**Cross References** — Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-25.

## RESEARCH REFERENCES

**ALR.** Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials. 4 A.L.R.4th 1274.

**Am Jur.** 8A Am. Jur. 2d, Bail and Recognizance § 68.

**CJS.** 8 C.J.S., Bail; Release and Detention Pending Proceedings §§ 48-52, 54.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 1:2.



**§ 99-5-37. Domestic violence; required appearance before judge; considerations; conditions.**

In any arrest for a misdemeanor which is an act of domestic violence, as defined in Section 99-3-7(5), no bail shall be granted until the person arrested has appeared before a judge of the court of competent jurisdiction. The defendant shall be brought before a judge at the first reasonable opportunity, not to exceed twenty-four (24) hours from the time of the arrest. In calculating the twenty-four (24) hours, weekends and holidays shall be included. The appearance may be by telephone. Upon setting bail in any case involving a misdemeanor which is an act of domestic violence, the judge shall give particular consideration to the exigencies of the case, including, but not limited to, (a) the potential for further violence, (b) the past history, if any, of violence between the defendant and alleged victim, (c) the level of violence of the instant offense, (d) any threats of further violence and (e) the existence of a domestic violence protection order prohibiting the defendant from engaging in abusive behavior, and shall impose any specific conditions as he or she may deem necessary. Specific conditions which may be imposed by the judge may include the issuance of an order prohibiting the defendant from contacting the alleged victim prior to trial, prohibiting the defendant from abusing or threatening the alleged victim or requiring defendant to refrain from drug or alcohol use. All such orders shall be reduced to writing.

**SOURCES:** Laws, 1998, ch. 525, § 2; Laws, 2003, ch. 431, § 1; Laws, 2007, ch. 589, § 11, eff from and after July 1, 2007.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference appearing in the first sentence. The reference to “Section 99-3-7” was changed to “Section 97-3-7.” The Joint Committee ratified the correction at its April 28, 1999 meeting.

**Amendment Notes** — The 2007 amendment substituted “Section 99-3-7(5)” for “Section 97-3-7” in the first sentence; substituted the present fifth sentence for the former last sentence, which read: “Upon setting bail in any case involving a misdemeanor which is an act of domestic violence, the judge shall give particular consideration to the exigencies of the case, including the potential for further violence, and shall impose any specific conditions as he or she may deem necessary”; and added the last two sentences.

**ATTORNEY GENERAL OPINIONS**

Defendant who has been convicted of a misdemeanor which is an act of domestic violence and has filed an appeal may have conditions imposed on his appeal bond similar to those of a bail bond. A violation

of such conditions may be remedied with revocation of the bond and incarceration pending appeal. Tallant, Sept. 26, 2003, A.G. Op. 03-0485.

**§ 99-5-39. Appearance bond as condition of any court ordered supervision; defendant's failure to appear as grounds for forfeiture of bond.**

(1) As a condition of any probation, community control, payment plan for any fine imposed or any other court ordered supervision, the court may order the posting of a bond to secure the appearance of the defendant at any subsequent court proceeding or to otherwise enforce the orders of the court. The appearance bond shall be filed by a duly licensed professional bail agent with the court or with the sheriff who shall provide a copy to the clerk of court.

(2) The court may issue an order sua sponte or upon notice by the clerk or the probation officer that the person has violated the terms of probation, community control, court ordered supervision or other applicable court order to produce the defendant. Upon seventy-two (72) hours' notice by the court or the clerk of court, the bail agent shall surrender the defendant in open court or to the sheriff. If the bail agent fails to produce the defendant in court or to the sheriff at the time noticed by the court or the clerk of court, the bond shall be forfeited according to the procedures set forth in Section 99-5-25. The defendant's failure to appear shall be the sole grounds for forfeiture of the appearance bond.

(3) The provisions of Sections 83-39-1 et seq. and 99-5-1 et seq. shall govern the relationship between the parties except where they are inconsistent with this section.

**SOURCES:** Laws, 2007, ch. 390, § 3, eff from and after July 1, 2007.

**Cross References** — Bail bonds and bondsmen, generally, see §§ 83-39-1 et seq.

## CHAPTER 7

### Indictment

#### SEC.

- 99-7-1. Indictment may charge offenses according to common law or statute.
- 99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.
- 99-7-3. Formal or technical words not necessary.
- 99-7-5. Allegations of time; want of perfect venue.
- 99-7-7. How instruments pleaded.
- 99-7-9. Presentment; entry on minutes of court; warrant to issue; copy of indictment to be served on defendant.
- 99-7-11. Concurrence of twelve grand jurors required for finding.
- 99-7-13. Secret record book; accused may be tried on copy made from record book.
- 99-7-15. Authority to inspect indictment limited to certain officers until arrest made.
- 99-7-17. Dilatory pleas; must be verified by oath.
- 99-7-19. Dilatory pleas; amendment of indictment or information.
- 99-7-21. Demurrers; when filed; amendment of indictment.
- 99-7-23. Motions to quash.
- 99-7-25. Amendment where name of unknown defendant is discovered.
- 99-7-27. Gambling or gaming.
- 99-7-29. Intoxicating beverage offenses.
- 99-7-31. Terms of indictment for larceny or embezzlement of money.
- 99-7-33. Libel.
- 99-7-35. Lotteries.
- 99-7-37. Murder and manslaughter.
- 99-7-39. Perjury.
- 99-7-41. Perjury; subornation of perjury.

#### **§ 99-7-1. Indictment may charge offenses according to common law or statute.**

Offenses at common law, indictable and punishable by special statutory provision, may be indicted as described or charged according to the common law or according to the statute, and, on conviction, the offenders shall be punished as prescribed.

**SOURCES:** Codes, 1857, ch. 64, art. 357; 1871, § 2864; 1880, § 3099; 1892, § 1453; Laws, 1906, § 1526; Hemingway's 1917, § 1288; Laws, 1930, § 1313; Laws, 1942, § 2561.

**Cross References** — Rights of accused in criminal prosecution generally, see Miss. Const. Art. 3, § 26.

Charging the grand jury, see Miss. Unif. Cir. & County Ct. Prac. R. 7.01.

Form of the indictment, see Miss. Unif. Cir. & County Ct. Prac. R. 7.06.



## JUDICIAL DECISIONS

**1. In general.**

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of two statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under § 97-9-45, which simply takes away earned time towards parole, rather than § 97-9-49, which provides for a possible sentence of up to two years, where the indictment was silent as to the applicable statute. *Beckham v. State*, 556 So. 2d 342 (Miss. 1990).

It is only necessary that misdemeanors be substantially charged and in charging

them, the use of technical terms is not essential to a description of the offense. *Wilson v. State*, 80 Miss. 388, 31 So. 787 (1902).

Extortion in office, under Code 1906, § 1161 [Code 1942, § 2144], being a common-law offense, may, under this section [Code 1942, § 2561], be charged according to the statute or common law, and it is not necessary under the latter to charge that it was "knowingly" done. *State v. Jones*, 71 Miss. 872, 15 So. 237 (1894).

The statute does not apply in a case where the act charged is a misdemeanor at common law and a felony by statute. In such case the offense must be charged to have been committed "feloniously." *Wile v. State*, 60 Miss. 260 (1882).

## RESEARCH REFERENCES

**ALR.** Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation. 2 A.L.R.4th 980.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information. 44 A.L.R.4th 401.

Effect on operation of Speedy Trial Act (18 USCS §§ 3161 et seq.) of indictment returned by grand jury whose term has expired. 64 A.L.R. Fed. 916.

**Practice References.** Cipes, Bernstein, and Hall, *Criminal Defense Techniques* (Matthew Bender).

Erickson and George, *United States Supreme Court Cases and Comments: Crimi-*

*nal Law and Procedure* (Matthew Bender).

Hrones *Criminal Practice Handbook*, Third Edition (Michie).

Kadish and others, *Criminal Law Advocacy* (Matthew Bender).

Mandiberg and Smith, *Crimes Against the Environment* (Michie).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Rudstein, Erlinder, and Thomas, *Criminal Constitutional Law* (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

## § 99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.

(1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

(3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.

(4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.

(5) Nothing contained in this section shall be construed to prohibit the court from exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.

**SOURCES:** Laws, 1986, ch. 444, eff from and after July 1, 1986.

### JUDICIAL DECISIONS

1. In general.
2. Illustrative cases.

#### 1. In general.

Defendant's motion for post-conviction relief was properly denied where the state did not improperly indict him under multiple indictments; Miss. Code Ann. § 99-7-2(1) made single, multi-count indictments permissive, not mandatory. *Jones v. State*, 956 So. 2d 310 (Miss. Ct. App. 2006).

Trial court properly dismissed defendant's motion for post-conviction relief after he was convicted of possession of more than two grams but less than 10 grams of cocaine, possession of more than 30 grams but less than 250 grams of marijuana, and possession of a firearm by a convicted felon, where the sentencing order was not illegal because he was sentenced separately on each charge pursuant to Miss. Code Ann. § 99-7-2(3). *Ward v. State*, 944 So. 2d 908 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion to sever three prescription forgery counts that occurred over a five-month period because the trial court applied the Corley Factors and found that five months was not a significant amount of time so as to require severance, and the total evidence in the case would have been admissible in separate trials of each count under Miss. R. Evid. 404(b). *Rushing v. State*, 911 So. 2d 526 (Miss. 2005).

As to verdicts and the imposition of separate sentences, separate charges on a

multicount indictment may be handled in one hearing. *Stovall v. State*, 873 So. 2d 1056 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the trial court did not err in denying defendant's motion to sever count one of the indictment because the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses; additionally the murders were all interwoven and occurred at the same place and closely in time. *Brawner v. State*, 872 So. 2d 1 (Miss. 2004).

Multicount indictment is permissible if the offenses are based on the same act or transaction, if the offenses are so connected as to constitute a single transaction or occurrence, or if the offenses constitute parts of a common scheme or plan. *Stone v. State*, 867 So. 2d 1032 (Miss. Ct. App. 2003).

Trial judge, in ruling on defendant's motion for severance, recognized that the offenses occurred at the same place, that the entire incident was over in a matter of minutes, and that there would be difficulties if the fact witnesses were allowed only to testify to a specific charge since the offenses were so interrelated that telling the story of what happened would be much harder if the offenses were severed; defendant did not make a showing of how each offense was separate and distinct

such that there was no reversible error in the trial court's ruling. *Riser v. State*, 845 So. 2d 720 (Miss. Ct. App. 2003).

Trial court properly denied appellant's motion for postconviction relief; appellant's argument that it was error to have charged him in separate indictments was procedurally barred. *Brooks v. State*, 832 So. 2d 607 (Miss. Ct. App. 2002).

State was permitted to try charges of kidnapping and assault together because the charges were so intertwined and overlapping that they constituted one episode or event. *Williams v. State*, 791 So. 2d 895 (Miss. Ct. App. 2001).

The applicability of subsection (1) is not limited where some element of the necessary proof as to one charge would be inadmissible on the other charge were it being tried separately. *Wright v. State*, 797 So. 2d 1028 (Miss. Ct. App. 2001).

State bears burden of prima facie showing that offenses charged in multi-count indictment are within language of statute that allows multi-count indictments. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

In hearing for severance of multi-count indictment, if state meets its burden of prima facie showing that offenses are within language of statute allowing multi-count indictments, defense may rebut by showing that offenses were separate and distinct acts or transactions. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

In determining whether multi-count indictment warrants severance, trial court should consider time period between offenses, whether evidence proving each offense would be admissible to prove the other counts, and whether offenses are interwoven. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

If trial court follows proper procedure in determining whether multi-count indictment warrants severance, Supreme Court will give deference to trial court's findings on review, employing abuse of discretion standard. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

Charges of 2 counts of sexual battery and one count of attempted sexual battery were properly combined in indictment, where transactions upon which offenses were based occurred over period of 5

months, and offenses were committed only against one child even when other children were present and available targets, which showed common plan. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

When a defendant raises the issue of severance, a trial court should hold a hearing on the issue. The State has the burden of making a prima facie case showing that the offenses charged fall within the language of the statute allowing multi-count indictments. If the State meets its burden, the defendant may rebut by showing that the offenses were separate and distinct acts or transactions. In making its determination regarding severance, the trial court should pay particular attention to whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven. If a trial court follows this procedure, the Supreme Court will review the trial court's decision under the abuse of discretion standard giving due deference to the trial court's findings. On review, the Supreme Court will defer to the trial court's findings even if the jury later acquits the defendant on one or more counts or if the Supreme Court concludes on appeal that a directed verdict, *j.n.o.v.* or new trial should have been granted on one or more counts. *Corley v. State*, 584 So. 2d 769 (Miss. 1991).

An indictment charging 2 rapes and one attempted rape committed by the defendant upon the same victim at different times was proper. The charges were properly joined under one indictment since they were part of a common scheme or plan, pursuant to the language of § 99-7-2(1)(b), in that they were connected by the identity of the victim and by the identity of the kind of act committed by the defendant. Furthermore, all of the evidence proving each count was fully admissible to prove each of the other counts and, therefore, if the State had tried the defendant at 3 separate trials, testimony as to the 2 other acts of rape would have been admissible at each of the 3 trials. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

On convictions for kidnapping and rape pursuant to §§ 97-3-53 and 97-3-65,



where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

A multi-count indictment is proper only where the charged offenses arise from a common transaction or occurrence or, when the occurrences are at different times, where that time period is insignificant. Thus, 2 burglaries could not be charged in the same indictment where the burglaries were committed on 2 different days and at least 2 days apart, the 2 houses involved in the burglaries belonged to different individuals and were miles apart, and nothing in the record indicated that there was a plan involved in burglarizing the houses. *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

An indictment improperly joined 8 counts of making harassing telephone calls where the indictment charged the defendant with 2 different crimes on 2 different dates against 2 different victims. *Gray v. State*, 549 So. 2d 1316 (Miss. 1989).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same defense — self-defense — to the two charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. *Blanks v. State*, 542 So. 2d 222 (Miss. 1989).

## 2. Illustrative cases.

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because the two murders that he was convicted of were interwoven; thus, the trial court did not abuse its discretion in its decision not to sever the counts. *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

Motion to sever was properly denied as to charges relating to church burglaries because they were part of a common scheme or plan, pursuant to Miss. Code Ann. § 99-7-2; however, drug and paraphernalia charges stemming from evidence found at defendant's residence during the execution of a search warrant were severed. *Dimaio v. State*, 951 So. 2d 581 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was proper where the sentencing order was appropriate pursuant to Miss. Code Ann. § 99-7-2 because the circuit court imposed separate sentences for each count of the indictment. *Ramage v. State*, 914 So. 2d 274 (Miss. Ct. App. 2005).

Common thread running through each of the counts was the gun. It was taken in the burglary, it was possessed, and it was sold, and each of the offenses were based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. It appeared that the scheme or plan was to commit a burglary and get items which could be sold illegally for cash. Severance of the counts was not warranted, and there was no impediment to trying count three (felon in possession of a firearm), with counts one (burglary of an inhabited dwelling) and two (sale of a stolen firearm), even though part of the necessary proof on count three would not have been admissible in counts one and two. *Harris v. State*, 908 So. 2d 868 (Miss. Ct. App. 2005).

Defendant's counsel was not ineffective for failing to request a severance of the two charges against defendant as the acts could be tried together under Miss. Code Ann. § 99-7-2 as defendant sold the same drug to the same undercover officer within 72 hours. *Watkins v. State*, 874 So. 2d 486 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion to sever counts of grand larceny and auto theft; where a pick-up truck was stolen on the same night that defendant was seen attempting to detach a trailer from a trailer hitch, the evidence showed a common scheme to obtain a pickup truck with which to steal equipment. *Stone v. State*, 867 So. 2d 1032 (Miss. Ct. App. 2003).

In a case where defendant was convicted of two counts of lustful touching of a child and two counts of sexual battery, since the trial court properly held a hearing concerning severance and also made it known that the jury would be required to evaluate each count of the indictment individually, the trial court did not abuse its discretion when it denied the motion for severance. *Broderick v. State*, 878 So. 2d 103 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

The fact that there was a multicount indictment against the defendant that pertained to separate and distinct crimes did not mandate reversal where the defendant was tried on charges of armed robbery and burglary of an inhabited dwelling stemming from the same incident and the remaining charges in the indictment were severed prior to trial. *Washington v. State*, 800 So. 2d 1140 (Miss. 2001).

As the second of two armed robberies was part of common plan, and the first robbery had been completed just shortly before commission of the second began,

the court did not err in refusing to sever the offenses. *Williams v. State*, 794 So. 2d 1019 (Miss. 2001).

A multi-count indictment was in compliance with this section, notwithstanding that all of the crimes involved different victims, since the defendant's crime spree constituted a "common scheme or plan" as contemplated in subsection 1(b); all of the events occurred over the brief period of seven hours in relatively close proximity to each other and all of the offenses were interrelated as they each involved assault and/or theft of property. *Patrick v. State*, 754 So. 2d 1194 (Miss. 2000).

There was no improper multiplicity or duplicity in an indictment that charged the defendant with four distinct and separate counts of embezzlement in Counts I - IV and one count of embezzlement that covered a time frame exclusive of the specific dates enumerated in Counts I - IV, but inclusive of the dates surrounding Counts II - IV. *Taylor v. State*, 754 So. 2d 598 (Miss. Ct. App. 2000).

The court properly allowed the joint trial of two counts for the sale of marijuana based on a common plan or scheme to sell marijuana to callers who paged him and met him at a specific location; a different result was not required by the fact that the second buy was not arranged until the first buy was completed or that the sales involved separate purchasers and occurred at separate times. *Ott v. State*, 722 So. 2d 576 (Miss. 1998).

## ATTORNEY GENERAL OPINIONS

Where a person commits multiple acts of receiving more Temporary Assistance for Needy Families than that to which he or she is entitled, he or she may be tried in

a single proceeding and separate sentences for each conviction may be imposed. *Taylor*, November 6, 1998, A.G. Op. #98-0665.

## RESEARCH REFERENCES

**ALR.** Additional peremptory challenges because of multiple criminal charges. 5 A.L.R.4th 533.

Joinder of offenses under Rule 8(a), Federal Rules of Criminal Procedure. 39 A.L.R. Fed. 479.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 91-102, (proceedings to quash, dismiss, or set aside accusatory pleading).

5 Am. Jur. Trials, §§ 12-20, (pretrial procedures and motions in criminal cases).

**CJS.** 42 C.J.S., Indictments and Informations §§ 161 et seq.

**Law Reviews.** 1989 Mississippi Supreme Court Review: Multiple Count Indictments. 59 Miss. L. J. 887, Winter, 1989.

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson, Hon. William H., and B.J. George, Jr., United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Manual (Michie).

### § 99-7-3. Formal or technical words not necessary.

The words "force and arms" or the words "contrary to the form of the statute," or any other merely formal or technical words, shall not be necessary in an indictment if, without them, the offense be certainly and substantially described.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 2(65); 1857, ch. 64, art. 7; 1871, § 2884; 1880, § 3001; 1892, § 1351; Laws, 1906, § 1423; Hemingway's 1917, § 1179; Laws, 1930, § 1203; Laws, 1942, § 2446.

**Cross References** — Indictments for violation of liquor laws not being quashed for want of form or having negative exceptions, see § 99-7-29.

Necessity for formal or technical words in an indictment, see Miss. Unif. Cir. & County Ct. Prac. R. 7.06.

### JUDICIAL DECISIONS

1. In general.
2. Particular crimes.

#### 1. In general.

The habitual offender portion of an indictment which was returned under § 99-19-83 was faulty in that it did not give the date of the judgment for a prior conviction and, therefore, the conviction should not have been allowed to be used in the habitual sentencing portion of the trial. *Ormond v. State*, 599 So. 2d 951 (Miss. 1992).

Defendants were sufficiently apprised of the offenses with which they were charged where the indictment cited and quoted relevant statutory language and provided a concise description of the essential facts pertaining to each offense. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment, with only 2 exceptions; the principle exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived, and additionally, a guilty plea does not waive subject matter jurisdiction. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

The fact that a defendant could have been prosecuted under either of 2 statutes did not require the state to select the offense with the lesser penalty so long as the indictment made clear which statute the state did select for prosecution. *Craig v. State*, 520 So. 2d 487 (Miss. 1988).



An indictment which charges the commission of a crime in the language of a statute, or in words aptly describing the offense, is sufficient although it does not designate the statute. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

An indictment must state name of victim of an offense where that is an element of the offense, and a failure to state or material variance between statement and proof of the name is fatal. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Ordinarily, it is not necessary for an indictment which properly sets forth the commission of a crime in language that brings it within the provisions of a statute to refer specifically to the statute. *Rogers v. State*, 198 Miss. 495, 22 So. 2d 550 (1945).

Omission of allegations in an indictment which go to the very essence of the offense attempted to be charged are not waived by defendant's failure to demur to the indictment. *Rogers v. State*, 198 Miss. 495, 22 So. 2d 550 (1945).

Where the words of a statute defining a crime are so specific as to give notice of the act made unlawful and so exclusive as to prevent its application to other acts it is sufficient to charge a statutory crime in an indictment in the language of the statute. *State v. Hinton*, 139 Miss. 513, 104 So. 354 (1925).

A clerical omission of an otherwise essential word in an indictment will not render the indictment void where the indictment sets out the nature and cause of the accusation. *Smith v. State*, 132 Miss. 521, 97 So. 4 (1923).

The omission of the word "feloniously" from an indictment charging an offense in the language of the statute cannot be raised in the supreme court on appeal for the first time, where the indictment otherwise informs the accused of the nature and cause of the accusation against him. *Patterson v. State*, 127 Miss. 256, 90 So. 2 (1921).

Statute applied and words "contrary to the form of the statute," held to be unnecessary. *Smith v. State*, 58 Miss. 867 (1881).

The use of words substantially synonymous with those in the statute is sufficient. *Harrington v. State*, 54 Miss. 490

(1877); *Roberts v. State*, 55 Miss. 421 (1877).

While it is better and safer to follow approved precedents and to adhere closely and precisely to the statutory description of offenses, yet the indictment will be good if "the offense be certainly and substantially described." *Kline v. State*, 44 Miss. 317 (1870).

The general rule is modified by the statute (Code 1906, § 1423 [Code 1942, § 2446]), so as to render unnecessary merely formal or technical words if, without them, the offense be certainly and substantially described. *Kline v. State*, 44 Miss. 317 (1870).

Statutory indictments: When the enacting clause describes the offense with certain exceptions named therein, it is necessary to negative the exceptions, but where the exceptions are in separate clauses of the statute, they may be omitted from the indictment and the defendant must show that his case comes within them to avail himself of their benefit. *Kline v. State*, 44 Miss. 317 (1870).

If there is in the language of the statute no sufficient words to define any offense, then the use of the exact and technical language of the statute alone is not sufficient, but in addition to the statutory language the full measure of the offense must be charged by the use of such words as are necessary and proper under established rules of law to characterize the crime. *Jesse v. State*, 28 Miss. 100 (1854); *Sarah v. State*, 28 Miss. 267 (1854); *Harrington v. State*, 54 Miss. 490 (1877); *Sullivan v. State*, 67 Miss. 346, 7 So. 275 (1889).

## 2. Particular crimes.

Indictment for sexual battery was insufficient where it failed to notify defendant that he was being charged with sexually penetrating victim without victim's consent; indictment did not include without consent in its charge. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

An indictment properly charged the defendant with simple assault under § 97-3-7, even though the indictment contained the word "feloniously" which does not appear in the statute. *Reining v. State*, 606 So. 2d 1098 (Miss. 1992).

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was intentional. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

An indictment charging the defendant with rape under § 97-3-65 was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

Surplus language contained in an indictment for rape under § 97-3-65(1) did not prejudice the defendant and was not improper where the indictment used the language "unlawfully, willfully and feloniously rape, ravish and carnally know." The term "unlawfully" appeared in both the indictment and the statute, the term "feloniously" means unlawfully with the intent to commit a felony-grade crime, "willfully" simply means voluntarily, and "ravish" means rape. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

The State could properly proceed against a defendant under § 97-29-45(1)(c), which prohibits making a harassing telephone call, rather than under § 97-29-45(1)(e), which prohibits repeated harassing telephone calls, even though the defendant allegedly made 7 harassing telephone calls to a single individual, so long as the indictment was clear and unequivocal. *Gray v. State*, 549 So. 2d 1316 (Miss. 1989).

Under the constitutions of both the United States and the State of Mississippi and under § 99-19-5, a jury instruction on child fondling should not have been given where the indictment charged only forcible rape since child fondling is not a

necessarily included offense of forcible rape and, therefore, the indictment did not sufficiently notify the defendant that he might face a charge of child fondling. *Hailey v. State*, 537 So. 2d 411 (Miss. 1988).

It is not necessary that an indictment charging conspiracy include the penalty sections of the code applicable to the underlying crime in order to trigger the conspiracy provisions of § 97-1-1, and to properly charge a felony. *Gardner v. State*, 531 So. 2d 805 (Miss. 1988).

An indictment was sufficient to notify the defendant that he had been charged with rape where it alleged that he made a lewd suggestion combined with a physical act (the placing of a towel over the victim's face), which was an overt act sufficient for the ultimate commission of a rape. *Alexander v. State*, 520 So. 2d 127 (Miss. 1988).

An indictment under the wording of the statute making it unlawful for the holder of a permit for the sale of beer or wine at retail to sell, give or furnish any beer or wine to a person under the age of 18 years, was not defective for failing to charge the defendant with knowing that his employee sold or gave beer to a minor, where the statute itself does not use the word "knowing" and where the indictment was based upon an affidavit so worded as to show that the defendant knew of his employee's activities in selling beer to a minor. *State v. Labella*, 232 So. 2d 354 (Miss. 1970).

An indictment charging the holder of a permit for the sale of beer and wine at retail with selling, giving or furnishing beer to a person under 18 years of age, was not defective in failing to charge the defendant with knowledge that his employee sold or gave beer to the minor, since the defendant's lack of knowledge of the acts of his employee was a defense and a question of fact for submission to the jury, and neither matters of evidence nor matters of defense need be averred in an indictment or information. *State v. Labella*, 232 So. 2d 354 (Miss. 1970).

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220, and against the peace and dignity of the State of Mississippi, the indictment adequately

charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827 (1955).

In a prosecution for rape where the indictment charged that prosecuting witness was a female of the age of 12 years or more, the failure of the indictment to allege that the prosecutrix was a child or a person or a human being did not constitute a fatal defect in the indictment. *Gillespie v. State*, 215 Miss. 380, 61 So. 2d 150 (1952).

Insufficiency of bigamy indictment may be raised for first time on appeal when indictment is fatally defective for failure to set forth time, place and circumstance of former marriage, or name of person with whom former marriage is alleged to have been contracted. *Wash v. State*, 206 Miss. 858, 41 So. 2d 29 (1949).

An indictment for grand larceny containing an incongruous description of the cow allegedly stolen if defective should have been availed of by demurrer and such defect could not be raised for first time on appeal. *Clark v. State*, 39 So. 2d 783 (Miss. 1949), error overruled, 206 Miss. 701, 40 So. 2d 591 (1949).

### RESEARCH REFERENCES

**ALR.** Use of abbreviation in indictment or information. 92 A.L.R.3d 494.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 115 et seq.

**CJS.** 42 C.J.S., Indictments and Informations §§ 129 et seq.

### § 99-7-5. Allegations of time; want of perfect venue.

An indictment for any offense shall not be insufficient for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for the want of a proper or perfect venue.

**SOURCES:** Codes, 1857, ch. 64, art. 266; 1871, § 2803; 1880, § 3013; 1892, § 1356; Laws, 1906, § 1428; Hemingway's 1917, § 1184; Laws, 1930, § 1208; Laws, 1942, § 2451.

**Cross References** — Failure to state the correct date on which the offense was allegedly committed, see Miss. Unif. Cir. & County Ct. Prac. R.7.06.

### JUDICIAL DECISIONS

1. In general.
2. Time, generally.
3. —Amendment.
4. Venue.

#### 1. In general.

In defendant's prosecution for wire fraud, a change of date in the indictment did not rise to a level of prejudice to defendant. Mississippi law forgives indict-

ments that are flawed for "stating the time imperfectly" of an offense, where the timing of such is not an essential element of the charge. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

An indictment should state some time and place where the offense was committed; otherwise it is demurrable. *State v. Glennen*, 93 Miss. 836, 47 So. 550 (1908).



## 2. Time, generally.

Fact that a traffic ticket issued in a DUI case had a scrivener's error regarding the date of offense did not render it ineffective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06 because defendant was put on notice of the date of the offense by the fact that the date was correct on the other two citations he was issued. *Scott v. City of Booneville*, — So. 2d —, 2007 Miss. App. LEXIS 185 (Miss. Ct. App. Mar. 27, 2007).

Defendant's conviction for sexual battery was affirmed; while the indictment did not identify singular dates as to when the incidents of sexual battery occurred, the indictment was not insufficient under Miss. Code Ann. § 99-7-5 because the indictment adequately prepared defendant and allowed him to prepare any possible defense. *Allred v. State*, 908 So. 2d 889 (Miss. Ct. App. 2005).

Defendant's indictment accused him of two counts of sexual battery against one child; the wording of the counts was identical, but the evidence and jury instruction conference indicated that the two counts were based upon defendant's confession of two separate incidents of sexual contact with the victim. Because there was nothing to indicate that time was an essential element of the offense, and defendant made no mention of an alibi defense, defendant was fully and fairly advised of the charges against him. *Baker v. State*, 930 So. 2d 399 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303 (Miss. 2006).

Defendant's conviction for sexual battery was affirmed; while the indictment did not identify singular dates as to when the incidents of sexual battery occurred, the indictment was not insufficient under Miss. Code Ann. § 99-7-5 because the indictment adequately prepared defendant and allowed him to prepare any possible defense. *Allred v. State*, 908 So. 2d 889 (Miss. Ct. App. 2005).

In an aggravated assault case, defendant was not prejudiced by the lack of specificity in the listing of the date of the offenses charged in the indictment, as a change in the date of the offenses did not affect the viability of defendant's defense, as the date was not the essence of the crimes and was, therefore, amendable and

not fatal. *Davis v. State*, 866 So. 2d 1107 (Miss. Ct. App. 2003).

In a prosecution for sexual battery of a child under the age of 14, the court properly denied a motion to compel the state to declare with more certainty exactly when the alleged offenses occurred; given the limited intellectual abilities of the victim, it would have been impossible for the state to prove the exact date of the offense with any more precision than had already been demonstrated. *Little v. State*, 744 So. 2d 339 (Miss. Ct. App. 1999).

An indictment charging a defendant with committing sexual battery "on or about" a certain date was specific enough to put the defendant on notice of the charge against him and the approximate date the crime took place, though the evidence presented at trial indicated that the sexual battery occurred 4 days after the date set forth in the indictment. *Daniel v. State*, 536 So. 2d 1319 (Miss. 1988).

An indictment charging escape from jail was not insufficient though it charged that the escape occurred one day before the date the escape actually took place. *Corley v. State*, 536 So. 2d 1314 (Miss. 1988).

Evidence of prior molestation of child was admissible because in context of sexual crimes, relaxation of rule that prosecution cannot offer evidence of criminal conduct not charged in indictment of which accused has not been convicted has long been recognized; substantially similar prior sexual acts with same person, that is, sexual acts of same general type as those charged in indictment, are as matter of common sense probative of issue being tried. *Wilson v. State*, 515 So. 2d 1181 (Miss. 1987).

An indictment incorrectly charging that the grand larceny was committed on November 14, 1968, while the evidence showed that it was actually committed on August 16, was not insufficient where the defendant was not surprised or prejudiced by testimony that the offense occurred on August 16, and in fact offered testimony of alibi for both dates. *Deaton v. State*, 242 So. 2d 452 (Miss. 1970).

In a prosecution on a charge of assault and battery with a stick, time was not of the essence and an indictment was suffi-

cient, notwithstanding the failure to allege the day of the month on which the crime was committed. *Moffett v. State*, 223 Miss. 276, 78 So. 2d 142 (1955).

An indictment is not defective because it does not state definitely the time at which the offense was committed. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260 (1955).

Indictment for embezzlement under Code 1942, § 2118, which alleges that embezzlement was committed on November 17, 1948, when in fact indictment was returned on that date, is not invalid for not stating date alleged crime was committed. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

In prosecution for trespass, state was not required to prove commission of offense on date alleged in affidavit, but could prove commission on any date within two years prior to indictment. *Card v. State*, 182 Miss. 229, 181 So. 524 (1938).

Refusal of instruction which in effect would require the state to prove commission of offense on date alleged in affidavit held not reversible. *Card v. State*, 182 Miss. 229, 181 So. 524 (1938).

Proof of possession of liquor, subsequent to date charged in the indictment for possession, held competent. *Smith v. State*, 144 Miss. 872, 110 So. 690 (1926).

Ordinarily, date of commission of offense need not be alleged, but on demurrer to indictment facts alleged therein, including date, must be assumed as true. *State v. Clark*, 145 Miss. 207, 110 So. 447 (1926).

An allegation as to the time of the commission of embezzlement held to be sufficient. *State v. Yeates*, 140 Miss. 224, 105 So. 498 (1925).

Under a charge of unlawful cohabitation proof of acts within two years before indictment is permissible. *State v. Meyer*, 135 Miss. 878, 101 So. 349 (1924).

Where the indictment charged the offense to have been committed Jan. 23, 1922, evidence may be admitted of the commission of the said crime at any time two years prior to the finding of the indictment, where the two-years statute of limitations barred the offense. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

In a prosecution for the unlawful sale of liquor, the state relied on a sale at a

different time from that laid in the indictment. This entitled the accused to a continuance on timely application and proper showing; but on his failure to make such application he has waived his right after verdict. *Peebles v. State*, 105 Miss. 834, 63 So. 271 (1913).

Evidence of the sale of liquor after date laid in the indictment warrants a conviction. *Oliver v. State*, 101 Miss. 382, 58 So. 6 (1912).

### 3. —Amendment.

In defendant's prosecution for wire fraud, a change of date in the indictment did not rise to a level of prejudice to defendant. Mississippi law forgives indictments that are flawed for "stating the time imperfectly" of an offense, where the timing of such is not an essential element of the charge. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

In a prosecution for illegal distribution of a controlled substance, time is not an essential element and, therefore, an amendment of the indictment to change the date on which the offense occurred is one of form only. *Martin v. State*, 724 So. 2d 420 (Ct. App. 1998).

In a prosecution for rape, the court properly allowed the amendment of the indictment with respect to the date of the rape where the victim's statement to the police, which contained the amended date, was admitted into evidence without objection and, assumedly, had been provided to the defendant. *Levy v. State*, 724 So. 2d 405 (Ct. App. 1998).

The state was permitted to amend an indictment charging sale of cocaine to change the date of the alleged sale, even though the jury had already been selected and impaneled, where the defendant's alibi defense and supporting witnesses were applicable for both dates. *Doby v. State*, 532 So. 2d 584 (Miss. 1988).

In a prosecution for aggravated assault upon a police officer, the trial court properly allowed the amendment of the indictment which contained an incorrect date of the crime where there was no proof of surprise or prejudice to the defendant as a result of the discrepancy. *Norman v. State*, 385 So. 2d 1298 (Miss. 1980).



Where 2 dates appear in an affidavit or an indictment, one of which is impossible and apparently a clerical error, the indictment is not invalid but may be amended. *Torrence v. State*, 283 So. 2d 595 (Miss. 1973).

Where an indictment, charging a father with neglect to provide for the support and maintenance of his children failed to state the year in which the offense was committed, and where a demurrer was interposed, it was not error for the court to permit an amendment so as to state the year and overrule the demurrer. *Archer v. State*, 214 Miss. 742, 59 So. 2d 339 (1952).

#### 4. Venue.

Defendant attempted to draw a distinction between an indictment that completely omitted any reference to venue and one that had an improper or imperfect statement of the venue of the crime as set out in Miss. Code Ann. § 99-7-5; an omission of any reference to venue was encompassed within the meaning of the phrase

"imperfect statement" found in the applicable statute. *Garner v. State*, 856 So. 2d 729 (Miss. Ct. App. 2003).

An indictment must give defendant notice of the place where the offense is alleged to have been committed by properly charging venue. *Evans v. State*, 144 Miss. 1, 108 So. 725 (1926).

An indictment for grand larceny in a county composed of two judicial districts, which simply stated the crime was committed in the county without designating the district does not charge venue of the crime as required by constitution. *Evans v. State*, 144 Miss. 1, 108 So. 725 (1926).

But under this section [Code 1942, § 2451] an indictment may be amended by order of the court so as to charge venue properly. *Evans v. State*, 144 Miss. 1, 108 So. 725 (1926).

The affidavit should state venue. *Jones v. State*, 133 Miss. 801, 98 So. 342 (1923).

An instance where the venue is imperfectly stated. *Smith v. Corporation of Oxford*, 91 Miss. 651, 45 So. 365 (1908).

### RESEARCH REFERENCES

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 128 et seq., 139 et seq.

**CJS.** 42 C.J.S., Indictments and Informations §§ 120-125.

## § 99-7-7. How instruments pleaded.

Whenever it shall be necessary to make an averment in an indictment as to any instrument, whether the same consists wholly or in part in writing, print, figures, or characters, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof.

**SOURCES:** Codes, 1857, ch. 64, art. 264; 1871, § 2801; 1880, § 3015; 1892, § 1358; Laws, 1906, § 1430; Hemingway's 1917, § 1186; Laws, 1930, § 1210; Laws, 1942, § 2453.

**Cross References** — Form of the indictment, see Miss. Unif. Cir. & Ct. Prac. R. 7.06.

### JUDICIAL DECISIONS

#### 1. In general.

When the false pretense charged in an indictment is in writing, the writing need not be set out in specific words, but it is

sufficient to set out the purport thereof, unless some question turns on the form or construction of the instrument or some other legal description is given in the



indictments, the accuracy of which may be material for the court to determine. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

In an indictment charging the accused with the crime of attempting to commit false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, a statement that certain named individuals involved in the scheme bought insurance contracts to indemnify themselves from loss occasioned by personal injuries received in automobile accidents, and that another person, also involved, had bought an in-

surance contract of indemnity for loss occasioned by acts of negligence committed by him in the operation of the automobiles, sufficiently described the insurance policies by designation and type and thereby indicated their purport within the meaning of this section [Code 1942, § 2453]. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

This section [Code 1942, § 2453] does not dispense with such certainty of description as will clearly identify the offense. An example furnished of insufficient averment. *Roberts v. State*, 72 Miss. 110, 16 So. 233 (1894).

### RESEARCH REFERENCES

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 112 et seq.

**CJS.** 42 C.J.S., Indictments and Informations § 144.

**Lawyers' Edition.** State regulation of judicial proceedings as violating com-

merce clause (Art I, § 8, cl 3) of Federal Constitution—Supreme Court cases. 100 L. Ed. 2d 1049.

## § 99-7-9. Presentment; entry on minutes of court; warrant to issue; copy of indictment to be served on defendant.

All indictments and the report of the grand jury must be presented to the clerk of the circuit court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accompanied by his affidavit that all indictments were concurred in by twelve (12) or more members of the jury and that at least fifteen (15) were present during all deliberations, and must be marked "filed," and such entry be dated and signed by the clerk. It shall not be required that the body of the grand jury be present and the roll called. An entry on the minutes of the court of the finding or presenting of an indictment shall not be necessary or made, but the endorsement by the foreman, together with the marking, dating, and signing by the clerk shall be the legal evidence of the finding and presenting to the court of the indictment. Unless the party indicted be in custody or on bond or recognizance entry of the indictment otherwise than by its number shall not be made at any time or for any purpose on the minutes or on any docket, nor shall any publicity be given to the fact of the existence of the indictment; but it shall never be made an objection to the indictment that it was improperly entered on the minutes or docket. A warrant for the person indicted shall immediately issue and be served on the person so indicted. After the arrest of the person indicted, and prior to arraignment, a copy of the indictment shall be served on such person.

**SOURCES:** Codes, 1857, ch. 64, art. 257; 1871, § 2794; 1880, § 3006; 1892, § 1346; Laws, 1906, § 1418; Hemingway's 1917, § 1174; Laws, 1930, § 1198; Laws, 1942, § 2441; Laws, 1964, ch. 354; Laws, 1977, ch. 307; Laws, 1991, ch. 421, § 1, eff from and after July 1, 1991.

**Cross References** — Severance of joint indictments, see §§ 99-15-47, 99-15-49.

Inapplicability of Mississippi Rules of Evidence to proceedings before grand juries, see Miss. R. Evid. Rule 1101.

Grand jury's power to accuse a person by name of an offense in absence of an indictment, see Miss. Unif. Cir. & County Ct. Prac. R. 7.03.

Docket management, see Miss. Unif. Cir. & County Ct. Prac. R. 9.02.

## JUDICIAL DECISIONS

1. In general.
2. Correction of clerical error.
3. Indorsement or signing of indictment.
4. Filing of indictment.
5. Service on defendant.
6. Affidavit of foreman.

### 1. In general.

In a prosecution for burglary, the trial court did not err in overruling defendants' demurrer to the complaint for failure to attach a sworn and subscribed affidavit thereto, as required by this section. *Usry v. State*, 378 So. 2d 635 (Miss. 1979).

The purpose and intent of the legislature in amending this section was to do away with the necessity of having at least 12 members of the grand jury, including the foreman, physically present when each and every indictment was returned to the court by providing an easier method, i.e., affidavits, by which the results of deliberations could be made known to the court. Thus, in a prosecution for selling marijuana, the trial court correctly overruled a demurrer to the indictment, even though the indictment was not accompanied by the foreman's affidavit, where the entire grand jury was before the court and filed the indictment, thus showing full compliance with the old, more laborious method of presenting indictments, and where there was no proof whatsoever of prejudice to defendant. *McCormick v. State*, 377 So. 2d 1070 (Miss. 1979).

A motion to quash an indictment could not be granted on the ground that only hearsay evidence was presented to the grand jury, since the court will not go beyond an indictment and inquire into

evidence considered by the grand jury to determine whether the evidence was in whole or in part hearsay. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

Where an indictment was lost and the accused made no objection to going to trial on a mere purported copy of the original indictment without the same being certified to, the omission of the clerk to certify the copy was an amendable defect which was waived by the failure of the accused to object. *Grimsley v. State*, 215 Miss. 43, 60 So. 2d 509 (1952).

Burden is upon accused, moving to quash indictment duly signed, presented and filed, to prove twelve grand jurors did not concur, and that district attorney was in grand jury room; affidavits are not sufficient. *Temple v. State*, 165 Miss. 798, 145 So. 749 (1933).

### 2. Correction of clerical error.

In a prosecution for armed robbery, the trial court properly overruled the defendant's demurrer to the indictment where the defect in the indictment was the omission of the words "21" and "January" from the line beginning with the word "Filed", which omission was later cured with the permission of the court and did not prejudice the defendant in any way. *Smith v. State*, 394 So. 2d 1340 (Miss. 1981).

Order of court entered on minutes is unnecessary to authorize clerk to correct manifest error or omission in filing of indictment. *Fairley v. State*, 163 Miss. 682, 138 So. 330 (1931).

Clerk, at same term at which indictment was returned, lawfully corrected manifest clerical error in date of filing indictment given as July 6, 1921, instead

of 1931. *Fairley v. State*, 163 Miss. 682, 138 So. 330 (1931).

### 3. Indorsement or signing of indictment.

Defendant's conviction and sentence for possession of more than one kilogram of marijuana with intent to distribute were both proper where the evidence met the totality of the circumstances test, including the drug dog's alerting to the package; further, her argument that the indictment was invalid because the foreman failed to sign it was improper because she raised the argument for the first time on appeal. *Arguelles v. State*, 867 So. 2d 1036 (Miss. Ct. App. 2003).

Allegations that indictments were defective because the record did not identify them as the indictments returned by the appropriate grand jury and because they were not accompanied by the affidavit of the grand jury foreman, involved nonjurisdictional defects which were waived when the defendant entered a voluntary guilty plea and failed to timely assert his claims in the lower court. Moreover, it was not clear that the defendant would have been entitled to relief even if the claims had been timely asserted because the indictments were signed by the foreman of the grand jury and marked "filed" by the county circuit clerk. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

In a prosecution for burglary, the trial court properly overruled defendant's demurrer to the indictment, even though the indictment did not contain an affidavit that it was concurred in by 12 or more members of the grand jury and that 15 had been present during deliberations, where the indictment was presented to the court in accord with common law procedure, in that all members of the grand jury were present at the time of their report to the court, and where the indictment showed on its face that it was endorsed by the foreman, dated, signed and marked filed by the circuit clerk. *Stewart v. State*, 377 So. 2d 1067 (Miss. 1979).

Defects in an indictment which was not marked "filed" and was not signed and dated by the circuit clerk, as required by this section, were procedural in nature and, unless raised by special demurrer,

were waived and could not be raised for the first time on appeal. *Jones v. State*, 356 So. 2d 1182 (Miss. 1978).

The names of the state's witnesses need not be endorsed on an indictment for burglary. *Kelly v. State*, 239 Miss. 683, 124 So. 2d 840, 85 A.L.R.2d 1199 (1960).

An indorsement in back of an indictment of a person whom the record showed was duly appointed and sworn as foreman of the jury was sufficient compliance with the section [Code 1942, § 2441]. *Moffett v. State*, 223 Miss. 276, 78 So. 2d 142 (1955).

Where an indictment was signed by the county attorney, it was not necessary for the district attorney to sign the indictment and it was sufficient for the indictment to be returned in court by the grand jury as provided by this section [Code 1942, § 2441]. *Watson v. State*, 212 Miss. 788, 55 So. 2d 441 (1951).

Objection that foreman of grand jury did not indorse name on indictment could not be raised for first time on appeal. *Pruitt v. State*, 163 Miss. 47, 139 So. 861 (1932).

The complaint that an indictment was not sufficiently identified because of absence of clerk's filing indorsement could not be raised for first time on appeal. *Wooten v. State*, 155 Miss. 726, 125 So. 103 (1929).

Claimed defect in indictment as not properly signed can only be reached on motion to quash and is not available for first time on appeal. *Wilcher v. State*, 152 Miss. 13, 118 So. 356 (1928).

The foreman of the grand jury is not required to endorse his name on the dotted line on an indictment, but an endorsement at some other place will be sufficient. *Dawsey v. State*, 144 Miss. 452, 110 So. 239 (1926).

### 4. Filing of indictment.

Dating, signing, and filing of indictment by clerk need not be done in presence of grand jury. *Fairley v. State*, 163 Miss. 682, 138 So. 330 (1931).

After conviction the accused cannot for the first time make the point that the indictment was not filed until after the argument was begun. *Washington v. State*, 78 Miss. 189, 28 So. 850 (1900).

The filing of an indictment, the dating of it and signing of the entry by the circuit



clerk is the exclusive evidence of its finding and presentation by the grand jury to the court. *Stanford v. State*, 76 Miss. 257, 24 So. 536 (1899).

An indictment not so "filed" is invalid, that is, a trial cannot be had on it. *Williamson v. State*, 64 Miss. 229, 1 So. 171 (1887).

The indorsement of the word "filed" on the indictment and the date signed by the clerk is the evidence of the finding and return. *Smith v. State*, 58 Miss. 867 (1881); *Cooper v. State*, 59 Miss. 267 (1881); *Holland v. State*, 60 Miss. 939 (1883); *Lea v. State*, 64 Miss. 294, 1 So. 244 (1886).

### 5. Service on defendant.

In defendant's auto burglary case, the indictment was properly served because defendant was already in possession of a copy of the indictment at the time his counsel moved to dismiss for improper service, at the hearing the circuit court judge stated that he wanted the lack of proper service to be cured, and defendant was re-served with the second indictment by the assistant district attorney and in the presence of the trial judge and his defense counsel. *Qualls v. State*, 947 So. 2d 365 (Miss. Ct. App. 2007).

The delivery of a copy of an indictment to an accused in compliance with Code 1942 § 2441, is mandatory. *Yarbrough v. Dowell Div. of Dow Chem. Co.*, 285 So. 2d 170 (Miss. 1973).

Defendant waived the requirements of Code 1942 § 2441, by voluntarily waiving a reading of the indictment without having made an objection to having been arraigned prior to receiving a copy of the indictment, although such is not necessarily so in capital cases. *Yarbrough v. Dowell Div. of Dow Chem. Co.*, 285 So. 2d 170 (Miss. 1973).

Although this section [Code 1942, § 2441] is mandatory in its requirements, a conviction would not be reversed on the ground that the state failed to serve a copy of the indictment on the defendant as required by the section, where the matter was not raised in the trial court and the record did not affirmatively show that the indictment was not served on the defendant. *Hall v. State*, 220 So. 2d 279 (Miss. 1969).

Where the matter was not raised in the trial court and the record does not show that a copy of the indictment was not served on the defendant, the presumption is that the provisions of this section [Code 1942, § 2441] in that respect had been complied with. *Hall v. State*, 220 So. 2d 279 (Miss. 1969).

Where the record is silent as to whether a copy of the indictment was in fact presented to the defendant prior to his arraignment, the supreme court will indulge the presumption that the judge and officers of the court have done their duty in the absence of authoritative evidence to the contrary. *Ford v. State*, 218 So. 2d 731 (Miss. 1969).

This section [Code 1942, § 2441] does not provide for any certain length of time between the serving of the copy of an indictment and the arraignment of the defendant, and in the absence of evidence that the defendant was prejudiced by the state's failure to serve a copy upon him sooner, it was not error to refuse to grant a continuance on this basis. *State v. Pearson*, 185 So. 2d 677 (Miss. 1966).

### 6. Affidavit of foreman.

An indictment is not rendered defective because it is not accompanied by an affidavit of the foreman of the grand jury; the legal evidence of the concurrence of 12 or more of the grand jurors in finding and presenting the indictment is fully established by the signing thereof on the part of the foreman and the marking of it as "filed" by the clerk of the court. *Morris v. State*, 767 So. 2d 255 (Miss. Ct. App. 2000).

This section in its present form only requires an affidavit attesting that all indictments then being returned meet the requirement that 15 members were present at the deliberations and that at least 12 concurred in the indictment, and does not require formal execution of the affidavit; thus, in a prosecution for armed robbery, the trial court did not err in overruling defendant's demurrer to the indictment, even though the foreman of the grand jury had failed to complete the affidavit on the back of the indictment, where the trial court announced that the record was to show that all grand jurors were in the courtroom for the presentation

of the indictment, and where no prejudice resulted from the failure to complete the affidavit. If the affidavit was omitted, such omission not appearing on the face of the

indictment, the omission might be subject to a motion to quash pursuant to § 99-7-23. *Jackson v. State*, 377 So. 2d 1060 (Miss. 1979).

### RESEARCH REFERENCES

**ALR.** Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 A.L.R.4th 429.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 25 et seq., 65, 76 et seq.

**CJS.** 42 C.J.S., Indictments and Informations §§ 24 et seq., 55.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

## § 99-7-11. Concurrence of twelve grand jurors required for finding.

The concurrence of twelve of the grand jurors shall be necessary to the finding of an indictment or making a presentment.

**SOURCES:** Codes, 1880, § 3005; 1892, § 1345; Laws, 1906, § 1417; Hemingway's 1917, § 1173; Laws, 1930, § 1197; Laws, 1942, § 2440.

**Cross References** — Constitutional provision on indictable offenses, see Miss. Const. Art. 3, § 27.

Charge to grand jury, see § 13-5-47.

Grand jury convening in vacation, see Miss. Unif. Cir. & County Ct. Prac. R. 7.02.

### JUDICIAL DECISIONS

#### 1. In general.

Presentment of indictment in court by grand jury foreman in other grand jurors' presence implies concurrence of requisite number thereof. *Temple v. State*, 165 Miss. 798, 145 So. 749 (1933).

Burden was on accused, moving to quash indictment duly signed, presented and filed, to prove that twelve grand jurors did not concur, and that district at-

torney was in grand jury room when indictment was found; affidavits as to such facts being insufficient. *Temple v. State*, 165 Miss. 798, 145 So. 749 (1933).

The fact that the foreman of a grand jury was excused from voting where as many as twelve of the grand jurors concurred in finding the indictment did not invalidate the indictment. *State v. Coulter*, 104 Miss. 764, 61 So. 706 (1913).

### RESEARCH REFERENCES

**ALR.** Necessity of alleging in indictment or information limitation-tolling facts. 52 A.L.R.3d 922.

**§ 99-7-13. Secret record book; accused may be tried on copy made from record book.**

The clerk of the circuit court shall, within ten days after the adjournment of each term of court, record the indictments returned into court in a well-bound book to be kept for that purpose which shall be styled "Secret Record of Indictments," and which shall be properly indexed and kept secret. If the office of the clerk be furnished with an iron safe or vault, the book shall be kept therein when not in actual use. If an indictment be lost or destroyed, the accused may be tried on a certified copy of the indictment made from the said record-book.

**SOURCES:** Codes, 1892, § 1347; Laws, 1906, § 1419; Hemingway's 1917, § 1175; Laws, 1930, § 1199; Laws, 1942, § 2442.

**Cross References** — Circuit court criminal docket, see § 9-7-175.

Penalty for disclosing facts about indictment, see § 97-9-53.

Secrecy of grand jury proceedings, see Miss. Unif. Cir. & County Ct. Prac. R. 7.04.

**JUDICIAL DECISIONS**

**1. In general.**

This section [Code 1942, § 2442] is constitutional. A defendant can be tried upon

the certified copy of the secret record. *McGuire v. State*, 76 Miss. 504, 25 So. 495 (1899).

**RESEARCH REFERENCES**

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 61 et seq.

**CJS.** 42 C.J.S., Indictments and Informations § 33.

**§ 99-7-15. Authority to inspect indictment limited to certain officers until arrest made.**

An indictment returned into the clerk of the circuit court, shall not be inspected by any person but the judge, clerk, district attorney, and sheriff, until the defendant shall have been arrested or has entered into bail or recognizance for the offense.

**SOURCES:** Codes, 1857, ch. 64, art. 259; 1871, § 2796; 1880, § 3007; 1892, § 1348; Laws, 1906, § 1420; Hemingway's 1917, § 1176; Laws, 1930, § 1200; Laws, 1942, § 2443; Laws, 1991, ch. 421, § 2, eff from and after July 1, 1991.

**Cross References** — Secrecy of grand jury proceedings, see Miss. Unif. Cir. & County Ct. Prac. R. 7.04.

**ATTORNEY GENERAL OPINIONS**

A sheriff is authorized to obtain information concerning which indictments have been returned with a true bill or no

bill, and this information may be acquired from the district attorney or through a personal inspection of the indictments.



Ferrell, July 3, 1997, A.G. Op. #97-0379.

Narcotics task force agents who are contract agents with the Mississippi Bureau of Narcotics have the power to execute a capias warrant issued pursuant to a grand jury indictment if such warrant is directed to such agents after it has been issued. Bowen, July 11, 1997, A.G. Op. #97-0408.

A district attorney (as a "person in charge of a law enforcement agency") or a circuit court clerk (as an officer of the court) may comply with Section 45-27-9 by

providing to the Mississippi Justice Information Center the information on a capias that either cannot or has not been served within a reasonable time period; if for some reason the sheriff cannot serve the capias on the defendant and returns the capias unserved, the information on the capias may be provided to the Mississippi Justice Information Center without violation of Section 97-9-53 or 99-7-15. Kitchens, Jr., April 17, 2000, A.G. Op. #2000-0192.

### § 99-7-17. Dilatory pleas; must be verified by oath.

A plea in abatement, or other dilatory plea to an indictment, shall not be received, unless the same be verified by the oath of the defendant.

**SOURCES:** Codes, Hutchinson's 1848, ch. 59, art. 1(50); 1857, ch. 64, art. 296; 1871, § 2760; 1880, § 3010; 1892, § 1352; Laws, 1906, § 1424; Hemingway's 1917, § 1180; Laws, 1930, § 1204; Laws, 1942, § 2447.

**Cross References** — Dilatory pleas; amendment of indictment or information, see § 99-7-19.

### § 99-7-19. Dilatory pleas; amendment of indictment or information.

An indictment or information shall not be abated by reason of any misnomer or dilatory plea; but in such case the court shall forthwith cause the same to be amended according to the proof, and proceed as though such plea had not been pleaded; and an indictment shall not be held insufficient for want of, or imperfection in, the addition of any defendant.

**SOURCES:** Codes, 1857, ch. 64, art. 267; 1871, § 2804; 1880, § 3011; 1892, § 1353; Laws, 1906, § 1425; Hemingway's 1917, § 1181; Laws, 1930, § 1205; Laws, 1942, § 2448.

**Cross References** — Dilatory pleas must be verified by oath, see § 99-7-17.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal courts, see § 99-35-11.

## JUDICIAL DECISIONS

### 1. In general.

Where the appellant failed to plead that his surname was not shown in the indict-

ment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the

trial court was not required to amend the indictment on its own motion. *Anselmo v. State*, 312 So. 2d 712 (Miss. 1975).

In a prosecution for rape, the omission of the Christian name of the accused constituted a formal defect in the indictment but the omission was not fatal and the court properly permitted amendment by inserting defendant's Christian name.

*Gillespie v. State*, 215 Miss. 380, 61 So. 2d 150 (1952).

Indictment for forgery is defective but amendable when it fails to allege the names of the individual persons composing the partnership defrauded by the forged instrument. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

## RESEARCH REFERENCES

**ALR.** Sufficiency of indictment, information, or other forms of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 A.L.R.3d 968.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 160 et seq.

**CJS.** 42 C.J.S., Indictments and Informations §§ 228 et seq.

## § 99-7-21. Demurrers; when filed; amendment of indictment.

All objections to an indictment for a defect appearing on the face thereof, shall be taken by demurrer to the indictment, and not otherwise, before the issuance of the venire facias in capital cases, and before the jury shall be impaneled in all other cases, and not afterward. The court for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended, and thereupon the trial shall proceed as if such defect had not appeared.

**SOURCES:** Codes, 1857, ch. 64, art. 268; 1871, § 2805; 1880, § 3012; 1892, § 1354; Laws, 1906, § 1426; Hemingway's 1917, § 1182; Laws, 1930, § 1206; Laws, 1942, § 2449.

**Cross References** — Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal courts, see § 99-35-11.

## JUDICIAL DECISIONS

1. In general.
2. Amendment.
3. Loss of remedy by failure to demur.
4. Matters subject to attack at any time.

### 1. In general.

Trial court did not err in allowing the trial to proceed with the amended indictment, which replaced "confidential informant" with the named co-defendant, because defendant could not have been "surprised" by the State's attempt to prove defendant transferred cocaine to co-defendant, and defendant knew of the circumstances of his arrest and the possibility of

the State needing to prove defendant transferred cocaine to co-defendant. *Jones v. State*, 912 So. 2d 973 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 1624, 164 L. Ed. 2d 339 (2006).

A trial court did not err in overruling a defendant's motion to quash the indictment and/or demur to the indictment, even though the minutes of the court did not reflect that a grand jury foreman was appointed or that the foreman was given the oath as required by § 13-5-45, where one of the names of the grand jurors was listed on the indictment as the grand jury

foreman, the foreman signed the grand jury report and indictment in the slot where the foreman signs, and the foreman's name was listed along with the other sworn grand jurors, since the statute does not provide that the court minutes must reflect that a grand jury foreman was appointed and sworn. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

An indictment charging defendant with aggravated assault, apparently in violation of § 97-3-7(2), was substantially defective in that it did not set out any alleged overt act whatsoever regarding defendant's alleged attempt to cause bodily harm to a patrolman, and, thus, his failure to file a demurrer under the provisions of § 99-7-21 did not prevent him from challenging the indictment. *Joshua v. State*, 445 So. 2d 221 (Miss. 1984).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under § 97-9-49, where the correct sentence for defendant under § 97-9-45, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. *Carleton v. State*, 438 So. 2d 278 (Miss. 1983).

Where five members of the coroner's jury and one arresting officer, who had heard accused voluntarily testify before the coroner's jury, appeared before the grand jury which indicted the accused and testified, accused's objection to the indictment should have been taken by a motion to quash before the issuance of the venire facias. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

Assuming that an indictment charging the defendant with an assault with a deadly weapon "with the intent and in the attempt to kill and murder" a named person, charged two offenses, one under § 787, Code of 1930, and the other under § 793 of the code, as contended by defendant, the defendant should have demurred, as the objection appeared on the face of the indictment, and such objection can only be made on demurrer where an offense is charged. *Norwood v. State*, 182 Miss. 898, 183 So. 523 (1938).

Under statute, a motion to withdraw a plea of not guilty and for permission to file a demurrer to an indictment after a jury had been impaneled and both sides were ready to offer evidence was properly overruled as not timely. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Where affidavit charging offense is defective on its face, demurrer is necessary to reach defect, and if defect is dehors record, motion to quash and evidence to support motion is necessary to reach defect. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Statutory provisions relating to demurrers to and motions to quash indictments held applicable to affidavits charging crime. *Sullivan v. State*, 150 Miss. 542, 117 So. 374 (1928); *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

The facts alleged by a plea in bar are admitted on demurrer only for the purpose of testing the legal question raised. *State v. Mitchell*, 95 Miss. 130, 48 So. 963 (1909).

Charging two offenses in the same count is bad practice but can be objected to only by demurrer under this section [Code 1942, § 2449]. *Clue v. State*, 78 Miss. 661, 29 So. 516, 84 Am. St. R. 643 (1901).

Objections to an indictment for defects apparent on its face must be made by demurrer only. *Gates v. State*, 71 Miss. 874, 16 So. 342 (1894); *Norton v. State*, 72 Miss. 128, 16 So. 264 (1894), later concurring opinion on other grounds, 18 So. 916 (Miss. 1894); *McQueen v. State*, 143 Miss. 787, 109 So. 799 (1926); *Wallace v. State*, 182 Miss. 441, 181 So. 522 (1938).

## 2. Amendment.

Defendant was not prejudiced by the last-minute amendment to the indictment accusing him of a drug sale when the change was merely a change of the date on which the transaction allegedly took place. *Alexander v. State*, 875 So. 2d 261 (Miss. Ct. App. 2004).

It was not error to permit the amendment of an indictment for murder to change the date of the offense from "on or about June 10, 1995" to "on or about June 7, 1995," i.e. from the date of death of the victim to the date of the crime, since such amendment was one of form rather than substance. *James v. State*, — So. 2d —,



2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000).

Indictment may only be amended at trial if amendment is immaterial to merits of case and if defense will not be prejudiced by amendment; test for whether amendment to indictment will prejudice defense is whether defense, as it originally stood, would be equally available after amendment is made. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

Amendment to indictment as to substance of charge must be made by grand jury. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

A trial court committed reversible error in allowing an indictment to be amended to charge the defendant with a violation of § 97-3-95(2) for sexual battery of a female "over" the age of 14 years, instead of § 97-3-95(1) for sexual battery of a female "under the age of 14 years, since the defendant's defense that the victim was not under 14 years of age but was 26 years old would have required the jury to return a verdict of acquittal; the amendment was "of substance" and was therefore beyond the power of the trial court to authorize. *Rhymes v. State*, 638 So. 2d 1270 (Miss. 1994).

A trial court did not err in allowing the State to amend an indictment charging the defendant with touching a child for a lustful purpose under § 97-5-23 by changing the dates on which the offenses occurred since the change was one of mere form rather than substance. *Baine v. State*, 604 So. 2d 258 (Miss. 1992).

A second indictment against a defendant, which added that the defendant was charged as a habitual offender, was not an improper amendment without the required action of the grand jury, since the second indictment was not an amendment of the original amendment on motion by the State, but was a second indictment returned by a grand jury. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

In a prosecution for aggravated assault under § 97-3-7, the defendant's conviction would be reversed where the grand jury returned the indictment under § 97-3-7(2)(b), which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under § 97-3-7(2)(a), which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. *Quick v. State*, 569 So. 2d 1197 (Miss. 1990).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than § 99-19-83, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).

A court committed reversible error in permitting the State to amend an indictment charging aggravated assault at the close of the State's case, at a time when the defendant had indicated his desire to file a motion for a directed verdict, from the charge "by shooting the [victim] in the head" to that of "a pistol, a means likely to produce serious bodily harm." Had the court not permitted the amendment of the indictment, the defendant would have been entitled to a directed verdict of not guilty on the aggravated assault charge of shooting the victim in the head with the pistol since the evidence was uncontradicted that the gun accidentally fired and that the victim was not wounded by the firing of the weapon. *Griffin v. State*, 540 So. 2d 17 (Miss. 1989).

It was not error for trial judge to not allow defendant to amend indictment to charge him with simple assault rather than gratification of lust, because indictment may only be amended for matters of form and not of substance, and trial court cannot amend indictment to change charge therein to another crime, except by action of grand jury which returned indictment; where defendant actually desired submission of lesser charge for deliberation by jury, which trial court did, amendment would be merely idle gesture. *Shive v. State*, 507 So. 2d 898 (Miss. 1987).

As in Mississippi, indictments can be amended in federal courts for matters of form but not substance, and the standards for judging the sufficiency of an indictment are essentially the same in both jurisdictions. *Copeland v. State*, 423 So. 2d 1333 (Miss. 1982).

In a prosecution for armed robbery, the trial court did not err in allowing the state to amend the indictment to change the amount from \$5,000 to \$1,700. This amendment was of form and not of substance, and was properly allowed under this section and Code 1972 § 99-17-13. *Sanders v. State*, 313 So. 2d 398 (Miss. 1975).

Where 2 dates appear in an affidavit or an indictment, one of which is impossible and apparently a clerical error, the indictment is not invalid but may be amended. *Torrence v. State*, 283 So. 2d 595 (Miss. 1973).

An indictment charging arson in the disjunctive by use of the word "or" may properly be amended to charge the offense in the conjunctive by substituting the word "and" for the word "or". *Byrd v. State*, 228 So. 2d 874 (Miss. 1969).

Affidavit on which criminal prosecution is based, not demurred to for defect appearing on the face, will be treated as sufficient; defect on face of affidavit, on which person is prosecuted in justice court, may be amended in circuit court on appeal; affidavit on which prosecution for failing to turn motor truck to right of center of highway on meeting another was based, not demurred to, held sufficient. *Sullivan v. State*, 150 Miss. 542, 117 So. 374 (1928).

An instance where the word "liquors" may be inserted into an indictment charg-

ing the sale of "spirituous and intoxicating" by way of amendment. *Keys v. State*, 110 Miss. 433, 70 So. 457 (1916).

### 3. Loss of remedy by failure to demur.

Defendant waived any claim that the indictment was defective because it did not name the confidential informant as the purchaser, and the issue was not raised in the trial court by way of a demurrer as required by Miss. Code Ann. § 99-7-21. *Griffin v. State*, 918 So. 2d 882 (Miss. Ct. App. 2006).

Defendant first argued that the indictment issued against him was defective, as the indictment misspelled his last name. However, the issue was not properly before the appellate court, as there was no substantive error in the indictment and because defendant did not object to the indictment at the trial level; thus, the issue was waived on appeal. *Forkner v. State*, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Motion to quash capital murder indictment, made before issuance of venire facias and renewed following impanelment of jury, was timely, where defendant did not press court to rule on initial motion in reliance upon state's assurance that burglary count was predicated on underlying assault and state subsequently informed defendant five days before trial that it might prosecute other felonies not named in indictment as basis for burglary charge. *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997).

An indictment's formal defect in failing to conclude with the words, "against the peace and dignity of the State of Mississippi," is curable by amendment; thus, such a defect is subject to waiver for the failure to demur to the indictment in accordance with § 99-7-21. *Brandau v. State*, 662 So. 2d 1051 (Miss. 1995).

In a prosecution for possession of a deadly weapon by a defendant previously convicted of a felony, failure to charge in the indictment that the weapon had been "concealed in whole or in part" as provided in § 97-37-1 did not entitle defendant to a directed verdict and a peremptory instruction of not guilty where the defense never objected to the defective indictment by means of a demurrer as required by this



section, where the defendant was fully informed of the charges against him by the inclusion in the indictment of § 97-37-5 in conjunction with § 97-37-1, and where there was no statute making it a crime to carry a deadly weapon unless it was concealed in whole or in part. *Jones v. State*, 383 So. 2d 498 (Miss. 1980).

In a prosecution for unlawful possession of a controlled substance described as preludin, the omission of a recital in the indictment that preludin contained phenmetrazine was an omission of substance, so that the trial court was without power under Code 1972 § 99-7-21 to allow the state to amend the indictment to correct the omission, notwithstanding defendant's failure to demur or otherwise challenge the sufficiency of the indictment; in order to make out a prima facie case under the indictment, it was necessary for the state to prove extrinsic facts showing that preludin contained phenmetrazine, a controlled substance under Code 1972 § 41-29-115, since preludin itself is not designated as a controlled substance. *Anthony v. State*, 349 So. 2d 1066 (Miss. 1977).

Where a county had been divided into two judicial districts for purpose of holding circuit and chancery courts, with each district to stand exactly as if it were a separate county, failure of the indictment to allege from which district the grand jurors were selected or in which district the crime was committed was a formal defect and could be amended; being amendable, the defect could not be raised for the first time in the Supreme Court. *Bolen v. State*, 309 So. 2d 524 (Miss. 1975).

Where, prior to the empaneling of a jury, the defendant failed to interpose a demurrer to an indictment charging a violation of the tax provisions of the Local Option Alcoholic Beverage Control Law but which failed to charge that the defendant "engaged or continued" in the business of selling intoxicating liquor without paying the required tax, objection to the sufficiency of the indictment cannot be raised for the first time on appeal. *Northcutt v. State*, 206 So. 2d 824 (Miss. 1967).

An indictment for burglary which stated in the body thereof that the grand

jurors were taken from Sunflower County where in fact they were taken from Humphreys County was defective as to form but did not prejudice the defendant nor violate any of his constitutional rights and the defendant could not raise an objection for the first time after his conviction. *Temple v. State*, 221 Miss. 569, 73 So. 2d 174 (1954).

In prosecution for murder, a motion to quash an indictment was too late where it was made five days after issuance of venire facias and after the selection of jury, where the defendant had a week after the return of indictment and before the issuance of venire facias in which to file a motion to quash. *Forman v. State*, 220 Miss. 276, 70 So. 2d 848 (1954).

Where an affidavit charged the defendant did wilfully and unlawfully sell one-half pint of liquor and it was amended to charge defendant with unlawful sale of intoxicating liquor, the affidavit sufficiently indicated the offense intended to be charged and the defect was on the face of it, it was amendable and the failure to demur to it constituted a waiver of defect. *Perciful v. Holley*, 217 Miss. 203, 63 So. 2d 817 (1953).

In a prosecution for contributing to the delinquency of a minor, where the affidavit was amended to add public drunkenness as an additional act and the record did not disclose any evidence as to surprise and there was no motion by defendant for continuance nor process for additional witnesses, the defendant could not now complain of the amendment. *Hall v. State*, 211 Miss. 90, 50 So. 2d 924 (1951).

An original affidavit upon which prosecution for contributing to delinquency of a minor was based must be considered as sufficient where no demurrer was filed. *Hall v. State*, 211 Miss. 90, 50 So. 2d 924 (1951).

If the insufficiency of an indictment was due to a defect which could have been remedied by the trial court, by an amendment, the point is waived by the accused if he fails to interpose a demurrer. *Crosby v. State*, 191 Miss. 173, 2 So. 2d 813 (1941).

An indictment charging the crime of assault and battery on a named person with intent to kill and murder was not void for failing to charge that such person



was a human being, since at most, it was only defective, and if a defect it should have been availed of by demurrer to the indictment prior to the impanelling of the jury and could not be raised first on appeal. *Rowland v. State*, 182 Miss. 886, 183 So. 527 (1938).

Defendant not demurring to robbery indictment for omission of word "by" before "means" cannot complain of such amendable defect after verdict. *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933).

The defects in an indictment which can be cured by amendment must be raised by demurrer, and it is too late after verdict to raise the question for the first time. *Moran v. State*, 137 Miss. 435, 102 So. 388 (1925).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings, the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. *Wilkinson v. State*, 77 Miss. 705, 27 So. 639 (1900).

#### 4. Matters subject to attack at any time.

A substantive defect in an indictment cannot be cured by extrinsic proof and is not waived by the failure to demur thereto. *Copeland v. State*, 423 So. 2d 1333 (Miss. 1982).

Lack of specificity in indictment as to accused having "been previously convicted of a felony" was not a formal defect correctable by amendment under § 99-7-21, and by failing to demur, accused did not waive the defect. *Morgan v. United States Fid. & Guar. Co.*, 291 So. 2d 741 (Miss. 1974).

Where an indictment failed to charge an essential element of the crime sought to be charged, the point was not waivable by the accused and might be raised for the first time on appeal. *Burchfield v. State*,

277 So. 2d 623 (Miss. 1973), but see *Monk v. State*, 532 So. 2d 592 (Miss. 1988).

An indictment for embezzlement that does not set out the name of the owner of the property embezzled is fatally defective, and the defect was not waived by the defendant's failure to demur. *Meyer(s) v. State*, 193 So. 2d 728 (Miss. 1967).

This section [Code 1942, § 2449] does not preclude an appellant from raising the insufficiency of an indictment to charge an offense on appeal, notwithstanding that the accused failed to demur to the same in trial court. *Cohran v. State*, 219 Miss. 767, 70 So. 2d 46 (1954).

An allegation as to the ownership of the building said to have been burglarized being an essential element of an indictment for burglary, failure of an indictment for burglary to contain such allegation was fatally defective, and could not be remedied by amendment. *Crosby v. State*, 191 Miss. 173, 2 So. 2d 813 (1941).

Failure of an indictment for burglary to contain the required allegation as to the ownership of the property claimed to have been burglarized is not a variance, and so does not render applicable a statutory provision permitting an amendment to an indictment in the discretion of the court, whenever, on the trial of the indictment, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof. *Crosby v. State*, 191 Miss. 173, 2 So. 2d 813 (1941).

An indictment for obtaining money on checks fraudulently must allege intent to defraud and this fatal error is not waived by failure to demur thereto. *Herron v. State*, 118 Miss. 420, 79 So. 289 (1918).

An omission in an indictment for a felony going to the very essence of the offense renders it void and subject to attack at any time notwithstanding this section [Code 1942, § 2449]. *Cook v. State*, 72 Miss. 517, 17 So. 228 (1895); *Taylor v. State*, 74 Miss. 544, 21 So. 129 (1897).

## RESEARCH REFERENCES

**ALR.** Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place. 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 A.L.R.3d 1358.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 A.L.R.3d 1357.

Power of court to make or permit amendment of indictment with respect to allegations as to money. 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment with respect to allegations as to criminal intent or scienter. 16 A.L.R.3d 1093.

Power of court to make or permit amendment of indictment. 17 A.L.R.3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances. 17 A.L.R.3d 1285.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 160 et seq., 282 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Indictments and Informations, Form 71, (demurrer).

**CJS.** 42 C.J.S., Indictments and Informations §§ 219 et seq., 228 et seq.

## § 99-7-23. Motions to quash.

All objections to an indictment for any defect dehors the face thereof, presenting an issue to be tried by the court, shall be taken by motion to quash the indictment, and not otherwise, within the time allowed for demurrer, and with the right to amend, as provided in the last preceding section.

**SOURCES:** Codes, 1857, ch. 64, art. 268; 1871, § 2805; 1880, § 3012; 1892, § 1355; Laws, 1906, § 1427; Hemingway's 1917, § 1183; Laws, 1930, § 1207; Laws, 1942, § 2450.

**Cross References** — Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal court, see § 99-35-11.

## JUDICIAL DECISIONS

1. In general.
2. Timeliness.
3. Appropriateness.

### 1. In general.

The function of a motion to quash is to test the legality of an indictment for some defect not appearing on the face of the indictment, and neither a motion to quash nor any other pretrial pleading can be employed to test the sufficiency of the evidence to support the indictment. *State v. Grady*, 281 So. 2d 678 (Miss. 1973).

Where defendant's neighbor, a private person, not connected with the police and observed from his own premises mari-

juana growing on defendant's adjoining land, and after conversation with an officer, he went back alone and at his own election, and plucked several of the plants which he later took to the police, and there was no participation by the police in any of these actions and nothing at all was done by them until after a search warrant had been issued, trial court did not err in denying a motion to suppress the evidence and quash the indictment on grounds that the neighbor committed a trespass upon defendant's land in obtaining the marijuana plants. *Wolf v. State*, 281 So. 2d 445 (Miss. 1973).

Grand jurors are incompetent to testify that return of an indictment was influenced by presence of circuit judge in grand jury room and by his participation in its deliberations, for purpose of impeaching the indictment on a motion to quash. *Sanders v. State*, 198 Miss. 587, 22 So. 2d 500 (1945).

Where affidavit charging offense is defective on its face, demurrer is necessary to reach defect, and if defect is dehors record, motion to quash and evidence to support motion is necessary to reach defect. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Statutory provisions relating to demurrers to and motions to quash indictments held applicable to affidavits charging crime. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Objections dehors the face of an indictment are properly presented by motion to quash. *State v. Coulter*, 104 Miss. 764, 61 So. 706 (1913); *Chandler v. State*, 143 Miss. 312, 108 So. 723 (1926).

The absence of a formal order permitting the filing of a motion to quash is waived by failure to object. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

An indictment should not be quashed for failure to allege facts which may properly be shown under a plea of not guilty. *State v. Mitchell*, 95 Miss. 130, 48 So. 963 (1909); *Hays v. State*, 96 Miss. 153, 50 So. 557 (1909); *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

Where a judgment quashing an indictment is reversed on appeal by the state, the case will be remanded and a new trial ordered on the same indictment. *State v. McDowell*, 72 Miss. 138, 17 So. 213 (1894); *State v. Jolly*, 73 Miss. 42, 18 So. 541 (1895); *State v. Gillis*, 75 Miss. 331, 24 So. 25 (1898); *State v. Bacon*, 77 Miss. 366, 27 So. 563 (1899).

## 2. Timeliness.

Motion to quash capital murder indictment, made before issuance of venire facias and renewed following impanelment of jury, was timely, where defendant did not press court to rule on initial motion in reliance upon state's assurance that burglary count was predicated on underlying assault and state subsequently informed defendant five days before trial that it

might prosecute other felonies not named in indictment as basis for burglary charge. *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997).

Where five members of the coroner's jury and one arresting officer, who had heard accused voluntarily testify before the coroner's jury, appeared before the grand jury which indicted the accused and testified, accused's objection to the indictment should have been taken by a motion to quash before the issuance of the venire facias. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

The legislature in enacting this section [Code 1942, § 2450] had in mind that if a defendant expects to bring some action to an indictment, it should be done before the county is put to the large expense of summoning a special venire and incurring liability for mileage and fees to the prospective jurors thus brought to court. *Forman v. State*, 220 Miss. 276, 70 So. 2d 848 (1954).

In prosecution for murder, a motion to quash an indictment was too late where it was made five days after issuance of venire facias and after the selection of jury, where the defendant had a week after the return of indictment and before the issuance of venire facias in which to file a motion to quash. *Forman v. State*, 220 Miss. 276, 70 So. 2d 848 (1954).

Motion to quash affidavit charging offense, made at conclusion of state's evidence and during introduction of defendant's evidence, and which failed to name defect in affidavit, held properly overruled as being too general and as coming too late. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

## 3. Appropriateness.

A trial court did not err in overruling a defendant's motion to quash the indictment and/or demur to the indictment, even though the minutes of the court did not reflect that a grand jury foreman was appointed or that the foreman was given the oath as required by § 13-5-45, where one of the names of the grand jurors was listed on the indictment as the grand jury foreman, the foreman signed the grand jury report and indictment in the slot where the foreman signs, and the foreman's name was listed along with the



other sworn grand jurors, since the statute does not provide that the court minutes must reflect that a grand jury foreman was appointed and sworn. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

An indictment may not be challenged because of incompetent evidence. *Hood v. State*, 523 So. 2d 302 (Miss. 1988).

Determination of sufficiency of evidence proposed to be presented to support crime charged in indictment is not appropriate matter for motion to quash. *State v. Peoples*, 481 So. 2d 1069 (Miss. 1986).

When constable resigns from office and does not seek re-election in compliance with agreement with district attorney, in which district attorney agrees not to prosecute constable, and constable is subsequently indicted for extortion, constable is entitled to have indictment quashed. *Edwards v. State*, 465 So. 2d 1085 (Miss. 1985).

An indictment will not be quashed because found by a grand jury after it had been orally discharged, where no order had been entered. *Earnest v. State*, 237 Miss. 509, 115 So. 2d 295 (1959).

Murder indictment was quashed for conduct of circuit judge in entering grand jury room and informing grand jurors that, because of absence of district attorney due to illness in his family, the circuit judge would perform the duties of district attorney pending the latter's arrival at court, in running over dockets with grand jurors and requesting them to take up the murder case in question, and being in grand jury room when sheriff exhibited weapon used in the homicide and heard

the sheriff's testimony, notwithstanding that the circuit judge was actuated by the best of motives and took particular pains not to express an opinion as to what their presentment should be, and was not in the grand jury room when the grand jurors discussed the evidence and voted upon the indictment. *Sanders v. State*, 198 Miss. 587, 22 So. 2d 500 (1945).

Statements by circuit judge dictated into record that he informed grand jury, that, because of absence of district attorney due to illness in his family, the circuit judge would advise the grand jury and would generally perform the duties of district attorney pending the latter's arrival at court, that circuit judge returned to the grand jury room after they had organized, ran over the docket with them, requested them to take up a particular homicide case, was in the grand jury room when the sheriff exhibited the weapon used in the homicide and heard the sheriff's testimony, but that the circuit judge took particular pains not to express an opinion as to what the grand jurors' presentment should be, as well as not to be in the grand jury room when they discussed the evidence and voted upon indictments, constituted an adverse ruling on motion to quash the particular homicide indictment on grounds that circuit judge acted as district attorney and his presence in the grand jury room, in view of fact that the court immediately proceeded to try the case on its merits under such indictment. *Sanders v. State*, 198 Miss. 587, 22 So. 2d 500 (1945).

A motion to quash was the appropriate remedy to attack an indictment based upon documents and papers obtained from the defendant under a writ of duces tecum, in view of defendant's immunity from prosecution under such circumstances. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

Where motion to quash affidavit charging offense was too general in that it failed to set out alleged defect and was not supported by evidence, motion to quash affidavit, made before jury was impaneled, held properly overruled. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Motion to quash affidavit charging offense, made at conclusion of state's evi-

dence and during introduction of defendant's evidence, and which failed to name defect in affidavit, held properly overruled as being too general and as coming too late. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Motion to quash indictment held properly denied where there was no offer of evidence by defendant when case was tried on merits in support of allegations. *Smith v. State*, 158 Miss. 355, 128 So. 891 (1930).

## RESEARCH REFERENCES

**ALR.** Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

**Am Jur.** 41-Am. Jur. 2d, Indictments and Informations §§ 160 et seq., 276, 278 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Indictments and Informations, Forms 91 et seq., 111 et seq., (motion to quash, dismiss, or set aside).

**CJS.** 42 C.J.S., Indictments and Informations §§ 195 et seq., 228 et seq.

## § 99-7-25. Amendment where name of unknown defendant is discovered.

If any indictment describes a defendant as a person whose name is to the jurors unknown, and it afterward appears that at the time of finding the bill his name was known, the court may order the indictment to be amended according to the fact.

**SOURCES:** Codes, 1857, ch. 64, art. 263; 1871, § 2800; 1880, § 3014; 1892, § 1357; Laws, 1906, § 1429; Hemingway's 1917, § 1185; Laws, 1930, § 1209; Laws, 1942, § 2452.

**Cross References** — Publication of summons for unknown heirs and unknown defendants in chancery court proceedings, see § 13-3-25.

Amendment of indictment or information in case of misnomer, or dilatory plea, see § 99-7-19.

Amendments in criminal case where variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal court, see § 99-35-11.

## JUDICIAL DECISIONS

### 1. In general.

Where the appellant failed to plead that his surname was not shown in the indictment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the trial court was not required to amend the indictment on its own motion. *Anselmo v. State*, 312 So. 2d 712 (Miss. 1975).

Variance between the name of accused in an indictment and the name under which he was extradited is immaterial where in all the proof he was named as in the indictment. *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961).

## RESEARCH REFERENCES

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations § 173.

**CJS.** 42 C.J.S., Indictments and Informations §§ 127, 241.

## § 99-7-27. Gambling or gaming.

In an indictment for gambling or gaming it shall be sufficient to charge the general name or description of the game at which the defendant may have played, without setting forth or describing with or against whom he may have bet or played; and an objection shall not be sustained to any such indictment for any defect or want of form, but the court shall proceed to give judgment according to the very right of the case.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 3(21); 1857, ch. 64, art. 144; 1871, § 2608; 1880, § 2854; 1892, § 1361; Laws, 1906, § 1433; Hemingway's 1917, § 1189; Laws, 1930, § 1213; Laws, 1942, § 2456.

**Cross References** — Gambling in general, see §§ 97-33-1 et seq.

Another section derived from same 1942 code section, see § 97-33-5.

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Gambling §§ 141 et seq.

**CJS.** 38 C.J.S., Gaming §§ 112 et seq.

## § 99-7-29. Intoxicating beverage offenses.

An indictment for a violation of any of the provisions of Chapter 31 of Title 97, Mississippi Code of 1972, entitled "Intoxicating Beverage Offenses" shall not be quashed or abated for want of form, and it shall not be necessary to aver the particular kind of liquors sold.

In any indictment or presentment for any violation of Chapter 31 of Title 97, Mississippi Code of 1972, it shall not be necessary to negative the exceptions therein contained, or that the liquors, bitters and drinks were not ordered, shipped, transported, or delivered for any of the purposes set out in Section 97-31-33 thereof but such exceptions may be relied upon as defense and the burden of establishing the same shall be upon the person claiming the benefits thereof.

**SOURCES:** Codes, Hutchinson's 1848, ch. 11, art. 5(8); 1857, ch. 20, art. 11; 1871, § 2698; 1880, § 1114; 1892, § 1595; Laws, 1906, § 1761; Hemingway's 1917, § 2097; Hemingway's 1921 Supp. § 2163m; Laws, 1930, §§ 1985, 2012; Laws, 1942, §§ 2624, 2651; Laws, 1918, ch. 189.

**Editor's Note** — Sections 97-31-1 and 97-31-3, referred to in this section, were repealed by Laws of 1988, ch. 562, § 3, effective from and after July 1, 1988.

Section 97-31-13, referred to in this section, was repealed by Laws of 1980, ch. 453, effective from and after passage (approved May 1, 1980).

**Cross References** — Dispensation of formalities in indictment, see § 99-7-3.



## JUDICIAL DECISIONS

**1. In general.**

In charging offense of unlawful possession of wine, it is not necessary to negative exception of homemade wine, and state is not required to prove that wine was not homemade wine used for domestic and household purposes only. *Forbert v. State*, 179 Miss. 66, 174 So. 248 (1937).

Indictment charging unlawful possession of still held not demurrable because it did not show it was a whisky still. *Powe v. State*, 176 Miss. 455, 169 So. 763 (1936).

Indictment for possession need not negative exceptions in statute. *Frazier v. State*, 141 Miss. 18, 106 So. 443 (1925).

That an indictment for unlawful possession of a still must negative exceptions. *State v. Speaks*, 132 Miss. 159, 96 So. 176 (1923); *Dawsey v. State*, 136 Miss. 18, 100 So. 526 (1924); *State v. Clark*, 145 Miss. 207, 110 So. 447 (1926).

## RESEARCH REFERENCES

**Am Jur.** 45 *Am. Jur.* 2d, *Intoxicating Liquors* §§ 302 et seq.

**CJS.** 48 *C.J.S.*, *Intoxicating Liquors* §§ 453, 454 et seq.

## § 99-7-31. Terms of indictment for larceny or embezzlement of money.

(1) In indictments for larceny or embezzlement of money or evidences of debt it shall be sufficient to describe the property in general terms, as “money,” “bank-notes,” “checks,” “bills of exchange,” “promissory notes,” and the like, of or about a certain amount and of certain value; and in an indictment for embezzlement of money or funds by a treasurer, cashier, or other fiduciary, it shall be sufficient to describe the same as a “balance of account” and of a certain value.

(2) In indictments for any crime in which the ownership of property, whether real or personal, must be alleged and proven, if ownership is vested in any entity other than an individual person, it shall be sufficient to allege and prove a name by which the entity is commonly known; and no indictment shall be held to be insufficient for failing to fully set forth such matters as governmental origins or the names of trustees, council members, supervisors, heirs or other persons with dominion or control over the entity or its property, and proof of such matter shall not be required at any trial upon the indictments.

**SOURCES:** Codes, 1892, § 1364; Laws, 1906, § 1436; Hemingway’s 1917, § 1192; Laws, 1930, § 1216; Laws, 1942, § 2459; Laws, 2006, ch. 426, § 1, eff from and after July 1, 2006.

**Amendment Notes** — The 2006 amendment added (2).

**Cross References** — Embezzlement involving public officers, see §§ 97-11-25 through 97-11-31.

Larceny-stealing bond, note, bill, securities or other evidences of debt, see § 97-17-45.

Embezzlement-property held in trust or received on contract, see § 97-23-25.

## JUDICIAL DECISIONS

1. Larceny.
2. Embezzlement.

**1. Larceny.**

While this section [Code 1942, § 2459] provides the exception as to descriptions of property in indictments for larceny by allowing the same to be described in general terms where the charge is for larceny of money or evidences of debt, the chapter on criminal procedure does not otherwise abrogate the common-law rule requiring the description of personal property in an indictment for larceny to be reasonably definite and certain. *Rutherford v. State*, 196 Miss. 321, 17 So. 2d 803 (1944).

A case where the description of money stolen is held to be sufficient where it is described as so many dollars of the value of so many dollars. *State v. Walker*, 115 Miss. 700, 76 So. 634 (1917).

**2. Embezzlement.**

An indictment for embezzlement should allege the ownership of the property al-

leged to have been embezzled. *Langford v. State*, 239 Miss. 483, 123 So. 2d 614 (1960).

Indictment for embezzlement does not have to set forth evidence, but only enough to inform defendant sufficiently of charge therein laid against him. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

Indictment for embezzlement of money received on sale of automobile by agent of seller is not demurrable for failure to state date of alleged sale by agent or name of person to whom automobile was alleged to have been sold. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

Indictment charging embezzlement by schoolteacher of money belonging to trustees of school without charging names of the trustees or alleging their names were unknown, is defective. *Voss v. State*, 208 Miss. 303, 44 So. 2d 402 (1950).

An indictment for embezzling money need not state the value of the money. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

## RESEARCH REFERENCES

**Am Jur.** 26 Am. Jur. 2d, Embezzlement §§ 36 et seq.  
50 Am. Jur. 2d, Larceny §§ 108 et seq.

**CJS.** 29A C.J.S., Embezzlement §§ 27 et seq.

## § 99-7-33. Libel.

An indictment for libel need not set forth any extrinsic facts to show the application of the defamatory matter charged in the indictment to the party libeled, but it shall be sufficient to charge generally that the same was published of or concerning him, and the fact that it was so published must be proved on the trial.

**SOURCES:** Codes, 1857, ch. 64, art. 256; 1871, § 2793; 1880, § 3017; 1892, § 1360; Laws, 1906, § 1432; Hemingway's 1917, § 1188; Laws, 1930, § 1212; Laws, 1942, § 2455.

**Cross References** — Criminal libel generally, see §§ 97-3-55, 97-3-57.

## RESEARCH REFERENCES

**ALR.** Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

**Am Jur.** 50 Am. Jur. 2d, Libel and Slander §§ 515 et seq.

## § 99-7-35. Lotteries.

An indictment for any of the crimes defined in Sections 97-33-31 to 97-33-49, Mississippi Code of 1972, being those sections concerning lotteries and raffles, shall be good which charges the crime in the language of the statute, without setting forth therein the number or date of the ticket or the device, or anything in the nature thereof, or policy, or that which represents the same, or the name of the lottery or gift enterprise, or where the same is located, or anything else not expressly embraced in the statutory definition or description of the crime.

**SOURCES:** Codes, 1871, § 2735; 1880, § 2979; 1892, § 1365; Laws, 1906, § 1437; Hemingway's 1917, § 1193; Laws, 1930, § 1217; Laws, 1942, § 2460.

## RESEARCH REFERENCES

<p><b>Am Jur.</b> 38 Am. Jur. 2d, Gambling §§ 155 et seq.</p>	<p><b>CJS.</b> 38 C.J.S., Gaming §§ 84 et seq. 54 C.J.S., Lotteries §§ 31, 35.</p>
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## § 99-7-37. Murder and manslaughter.

(1) In an indictment for homicide it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient to charge in an indictment for murder, that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased. It shall be sufficient, in an indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, concluding in all cases as required by the Constitution of this state.

(2) An indictment for murder or capital murder shall be sufficient to also charge the lesser offense of manslaughter without a specific allegation of such lesser crime and without any necessity for an additional count charging such lesser crime.

**SOURCES:** Codes, 1857, ch. 64, art. 265; 1871, § 2802; 1880, § 3016; 1892, § 1359; Laws, 1906, § 1431; Hemingway's 1917, § 1187; Laws, 1930, § 1211; Laws, 1942, § 2454; Laws, 2004, ch. 393, § 2, eff from and after passage (approved Apr. 20, 2004.)

**Cross References** — Right of accused in criminal prosecution to demand nature and cause of accusation, see Miss. Const. Art. 3, § 26.

## JUDICIAL DECISIONS

1. In general.
2. Validity.
3. Construction and application.
4. Sufficiency of indictment.
5. Sufficiency of the evidence.

### 1. In general.

An indictment charging that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220 and against the



peace and dignity of the State of Mississippi, adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827 (1955).

Indictment in language of statute for murder need not set forth manner and details of homicide. *Talbert v. State*, 172 Miss. 243, 159 So. 549 (1935).

## 2. Validity.

Mississippi capital murder indictments alleging that defendant entered house "to unlawfully do violence to the persons situated therein" were fatally defective for their failure to state intended felony that comprised charged burglary; "intent to do violence" was not a crime, prosecutor based his argument to support charge of burglary upon that "non-crime," and jury was instructed that burglary charge could be predicated upon defendant's intent either to steal or to "unlawfully do violence." *Lockett v. Puckett*, 988 F. Supp. 1019 (S.D. Miss. 1997).

The means and manner of the commission of murder are not necessarily embraced in a description "of the nature and cause of the accusation" in the sense of Art. 3, § 26 of the constitution of the state; hence the statute is constitutional. *Newcomb v. State*, 37 Miss. 383 (1859).

## 3. Construction and application.

This section [Code 1942, § 2454] covers all homicides, both statutory and common law, and under an indictment drawn in accordance therewith any facts that evidence murder or manslaughter may be introduced in evidence. *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938).

Assault with intent is not within statutory indictment for murder. *Bell v. State*, 149 Miss. 745, 115 So. 896 (1928); *Scott v. State*, 60 Miss. 268 (1882).

The word "feloniously" carries with it the idea the killing is unlawful in an indictment for murder. *Winston v. State*, 127 Miss. 477, 90 So. 177 (1922).

The word "did" in an indictment for murder held to be a part of the offense charged. *Hall v. State*, 91 Miss. 216, 44 So. 826 (1907).

## 4. Sufficiency of indictment.

Denial of the inmate's petition for post-conviction relief was appropriate because his motion was time-barred and there was no applicable exception to the time limit; the supreme court held that the inmate was required, and failed, to prove that he was prejudiced by evidence that should have been excluded in a simple murder trial; additionally, the first portion of his indictment, standing alone, sufficiently charged him with simple murder. *Lambert v. State*, 941 So. 2d 804 (Miss. 2006).

Defendant was properly apprised of the nature and cause of a homicide by an indictment, despite the fact that the manner and method of the crime was not disclosed; the jury instructions sufficiently informed the jury that the act committed by defendant involved asphyxiation. *Starns v. State*, 867 So. 2d 227 (Miss. 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the undicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. *State v. Shaw*, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), subst. op., 880 So. 2d 296 (Miss. 2004).

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense, and defendant was not prejudiced by the failure of the original indictment to state a specific overt act by which the homicide was committed, particularly where the indictment was amended to read "by shooting with a pistol." *Jones v. State*, 856 So. 2d 285 (Miss. 2003).

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was

intentional. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

Murder indictment which follows language of “depraved heart” provision of § 97-3-19 need not use words “malice aforethought.” *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

The trial court was correct in overruling defendant’s demurrer to the indictment in a prosecution for manslaughter, notwithstanding the contention that the indictment should have charged that the death had occurred “by culpable negligence” and that use of the word “willfully” resulted in a charge of voluntary rather than involuntary manslaughter. *Yazzie v. State*, 366 So. 2d 240 (Miss. 1979).

Where an indictment charged that the defendant did willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the deceased, the indictment was sufficient to charge murder in the proper terms, and the state was entitled to instructions setting forth both the theory of a premeditated killing and the theory of a homicide resulting from the commission of a crime of violence. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368 (Miss. 1969).

An indictment for manslaughter in the statutory form is sufficient. *Jones v. State*, 244 Miss. 596, 145 So. 2d 446 (1962).

An indictment for manslaughter charging that the defendant “did unlawfully and feloniously kill and slay” a certain

person, a human being, was sufficient. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

Manslaughter indictment charging defendant wilfully and feloniously killed certain person by culpable negligence held not defective because of word “wilful.” *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

Manslaughter indictment charging culpable negligence held not defective because not setting forth conduct constituting culpable negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

Indictment for manslaughter setting up alleged negligence in operation of automobile was sufficient against demurrer. *Bradford v. State*, 158 Miss. 210, 127 So. 277 (1930).

An indictment for a homicide may follow the form given in the statute and it will be sufficient. *Lee v. State*, 124 Miss. 398, 86 So. 856 (1921).

### 5. Sufficiency of the evidence.

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense; viewing as true the evidence which supports the jury’s verdict, it could not be said that the verdict was so contrary to the overwhelming weight of the evidence that allowing it to stand would result in “an unconscionable injustice.” *Jones v. State*, 856 So. 2d 285 (Miss. 2003).

## RESEARCH REFERENCES

**ALR.** Necessity and materiality of statement of place of death in indictment or information charging homicide. 59 A.L.R.2d 901.

**Homicide:** Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Determination of “materiality” under USCS § 1623, penalizing false material declarations before grand jury or court. 60 A.L.R. Fed. 76.

**Am Jur.** 40 Am. Jur. 2d, Homicide §§ 202 et seq., 442 et seq.

**CJS.** 40 C.J.S., Homicide §§ 213 et seq.

## § 99-7-39. Perjury.

In an indictment for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant — that he was sworn or testified on oath, and before what court, or before whom the oath or affirmation was taken; averring the court or person to have had competent authority to administer the

same, together with proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or the commission or authority of the person before whom the perjury was committed.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 1(40); 1857, ch. 64, art. 211; 1871, § 2667; 1880, § 2928; 1892, § 1362; Laws, 1906, § 1434; Hemingway's 1917, § 1190; Laws, 1930, § 1214; Laws, 1942, § 2457.

**Cross References** — Conviction for perjury or subornation of perjury disqualifying witness, see § 13-1-11.

Indictment for subornation of perjury, see § 99-7-41.

Perjury generally, see §§ 97-9-59 et seq.

## JUDICIAL DECISIONS

### 1. In general.

An indictment for perjury must specifically allege the true facts; thus, an indictment for perjury was fatally defective and should have been quashed where it did not attempt to set out the truth as to the allegation that the defendant had "testified falsely that he had not been court-martialed in the military and that he had an honorable discharge and a general discharge under honorable conditions from the United States Army." *Ford v. State*, 610 So. 2d 370 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

Conviction of defendant for perjury was upheld over objection that alleged perjury was not proved by testimony of 2 witnesses or by one witness and corroborating circumstances; common-law rule requiring one witness and corroborating

circumstances to sustain perjury conviction refers only to proof of falsity of accused's statement, but does not extend to proof of other elements of crime; testimony of defendant's mother satisfied requirement that one witness testify to falsity of defendant's testimony at trial where perjury was allegedly committed, and her testimony was consistent with defendant's 2 prior sworn statements; to sustain conviction, both of contradictory statements must be under oath. *McFee v. State*, 510 So. 2d 790 (Miss. 1987).

Where an exhibit attached to an indictment for perjury showed on its face that the defendant was not under oath when the allegedly false statements in his application for voter registration were made, the indictment was fatally defective, and in a coram nobis proceeding the defendant was discharged. *Echoles v. State*, 254 Miss. 133, 180 So. 2d 630 (1965).

To charge that the assistant cashier of a bank "did make oath" is sufficient to show that oath was made in writing. *State v. Kelly*, 113 Miss. 461, 74 So. 325 (1917).

This section [Code 1942, § 2457] does not dispense with the necessity of averring the substance of the issue on which the perjury is charged to have been committed. To do so would violate Const. 1890 § 26, securing to the defendant the right to demand the nature and cause of the action against him. *State v. Silverberg*, 78 Miss. 858, 29 So. 761 (1901).



An indictment for perjury must aver what the truth is in relation to the matter of which perjury is assigned. *State v. Silverberg*, 78 Miss. 858, 29 So. 761 (1901).

An indictment for perjury setting forth the court proceedings, issue and trial in

which and date at which the perjury was committed and not otherwise defective is sufficient under this section [Code 1942, § 2457]. *State v. Jolly*, 73 Miss. 42, 18 So. 541 (1895).

#### RESEARCH REFERENCES

**Am Jur.** 60A *Am. Jur.* 2d, Perjury §§ 25 et seq.

**CJS.** 70 *C.J.S.*, Perjury §§ 48 et seq.

### § 99-7-41. Perjury; subornation of perjury.

In an indictment for subornation of perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, or any part of the record or proceeding, either in law or equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 64, art. 1(40); 1857, ch. 64, art. 212; 1871, § 2668; 1880, § 2929; 1892, § 1363; *Laws*, 1906, § 1435; *Hemingway's* 1917, § 1191; *Laws*, 1930, § 1215; *Laws*, 1942, § 2458.

**Cross References** — Subornation of perjury, see § 97-9-63.  
Indictment for perjury, see § 99-7-39.

#### RESEARCH REFERENCES

**Am Jur.** 60A *Am. Jur.* 2d, Perjury § 61.

## CHAPTER 9

### Process

#### SEC.

- 99-9-1. Capias or alias issued for arrest on indictment.
- 99-9-3. Corporations; summons issued on indictment; execution on judgment.
- 99-9-5. Corporations; summons issued to other counties.
- 99-9-7. Corporations; order to appear mailed and published if corporation not found; appearance and plea entered; execution.
- 99-9-9. Corporations; proceeding before justice of the peace.
- 99-9-11. Subpoenas for witnesses.
- 99-9-13. Issuance of subpoena for witness to give deposition for use in another state.
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- 99-9-17. Service of subpoena.
- 99-9-19. Attachment for non-appearing subpoenaed witness.
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- 99-9-23. Witness subpoenaed in vacation to appear before grand jury.
- 99-9-25. Attachment of subpoenaed witnesses failing to appear before grand jury.
- 99-9-27. Uniform witness attendance law; short title.
- 99-9-29. Definitions.
- 99-9-31. Summoning witnesses in this state to testify in another state.
- 99-9-33. Witness from another state summoned to testify in this state.
- 99-9-35. Exemption from arrest and service of process.
- 99-9-37. Uniformity of interpretation.

### § 99-9-1. Capias or alias issued for arrest on indictment.

The process for arrest on an indictment shall be a capias, which shall be issued immediately on the return of the indictment into court, and made returnable instanter, unless otherwise ordered by the court, and if the capias be not returned executed, the clerk shall issue an alias, returnable to the next term, without an order for that purpose.

**SOURCES:** Codes, 1857, ch. 64, art. 284; 1871, § 2784; 1880, § 3018; 1892, § 1366; Laws, 1906, § 1438; Hemingway's 1917, § 1195; Laws, 1930, § 1218; Laws, 1942, § 2461.

### JUDICIAL DECISIONS

#### 1. In general.

The term "process," within the meaning of the section stipulating that all process, except where otherwise provided, shall be issued and signed by the clerk of the court, includes the ordinary warrant for arrest, and certainly so when taken in connection with this section [Code 1942, § 2461] opening with the sentence that "the process for arrest on an indictment shall be a

capias," etc. *Cooper v. State*, 193 Miss. 672, 10 So. 2d 764 (1942).

The fact that a capias for arrest on a misdemeanor charge was issued on the affidavit of the county prosecuting attorney, by the clerk of the county court without any order therefor from the county judge, did not render it invalid, or avoid jurisdiction, by the court over the person of the defendant, since, inasmuch as the

affidavit of the county prosecuting attorney took the place of an indictment in the circuit court, the process on the charge of misdemeanor so made was a *capias* to be

issued by the clerk of the county court. *Cooper v. State*, 193 Miss. 672, 10 So. 2d 764 (1942).

### RESEARCH REFERENCES

**Practice References.** Cipes, Bernstein, and Hall, *Criminal Defense Techniques* (Matthew Bender).

Erickson, Hon. William H. and B.J. George, *United States Supreme Court Cases and Comments: Criminal Law and Procedure* (Matthew Bender).

Hrones, *Criminal Practice Handbook*, Third Edition (Michie).

Kadish and Others, *Criminal Law Advocacy* (Matthew Bender).

Mandiberg, Susan F. and Susan L. Smith, *Crimes Against the Environment* (Michie).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Rudstein, Erlinder, and Thomas, *Criminal Constitutional Law* (Matthew Bender).

*Federal Criminal Laws and Rules* (Michie).

*Mississippi Criminal and Traffic Manual* (Michie).

### § 99-9-3. Corporations; summons issued on indictment; execution on judgment.

When an indictment shall be found against a corporation, a summons shall be issued against it, by its corporate name, to appear and answer the indictment, which summons may be executed as a summons against a corporation in a civil suit; and upon the summons being returned executed, the corporation shall be considered in court, and appearing to the indictment, and the court shall, unless the defendant do so of its own accord, cause an appearance for it to be entered of record; and such proceedings may then be had thereon as if the corporation had appeared and pleaded thereto; and if the corporation be convicted on the indictment, the court may pass judgment thereon, and cause process of execution to be issued against the goods and chattels, lands and tenements of the corporation for the amount of the fine and costs which may be awarded against it, as on a judgment in a civil suit; and the sheriff shall proceed to sell the goods and chattels, and lands and tenements of the corporation on the execution as on an execution issuing against a corporation in a civil suit.

**SOURCES:** Codes, 1857, ch. 64, art. 269; 1871, § 2769; 1880, § 3019; 1892, § 1367; Laws, 1906, § 1439; Hemingway's 1917, § 1196; Laws, 1930, § 1219; Laws, 1942, § 2462.

**Cross References** — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.



## RESEARCH REFERENCES

Am Jur. 62B Am. Jur. 2d, Process  
§ 129.

**§ 99-9-5. Corporations; summons issued to other counties.**

If the summons be returned not executed, and the officer shall make affidavit that he hath made diligent inquiry and cannot ascertain any place of business of the corporation in the county, or the name of any officer of the corporation, resident in the county in which such indictment shall have been found, upon whom the summons could be executed, then the court shall make an order directing a summons to issue to any other county of the state in which the defendant corporation may be served, or the summons may be issued in the first instance without a precedent order of the court, and its service shall be as effectual as if served in the county where the indictment is found.

**SOURCES:** Codes, 1857, ch. 64, art. 270; 1871, § 2770; 1880, § 3020; 1892, § 1368; Laws, 1906, § 1440; Hemingway's 1917, § 1197; Laws, 1930, § 1220; Laws, 1942, § 2463.

**Cross References** — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.

**§ 99-9-7. Corporations; order to appear mailed and published if corporation not found; appearance and plea entered; execution.**

If it be made known to the court, by affidavit of any credible person, as required in suits in chancery against non-residents, that the defendant corporation is non-resident, or cannot be found in this state, it shall order said corporation to cause its appearance to be entered, and to plead to the indictment, on or before the first day of the next term of the court, a copy of which order shall, within thirty days, be forwarded by mail to the corporation, postage paid, by the clerk of the court, if the post-office address be made known by the affidavit; and it shall also be published for three weeks in one of the public newspapers printed in this state, as the court may direct. If the corporation shall not appear within the time limited by such order, or within such further time as the court shall appoint, then, on due proof of the mailing and publication, or of the publication, the court shall order the clerk to enter an appearance and plea of not guilty for said corporation, and, thereupon, further proceedings may be had on such indictment as if the corporation had appeared and pleaded thereto. In case of conviction, execution may be issued and proceedings had thereon as described in section 99-9-5.

**SOURCES:** Codes, 1857, ch. 64, art. 270; 1871, § 2770; 1880, § 3020; 1892, § 1369; Laws, 1906, § 1441; Hemingway's 1917, § 1198; Laws, 1930, § 1221; Laws, 1942, § 2464.

**Cross References** — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.

### § 99-9-9. Corporations; proceeding before justice of the peace.

Process and proceedings like those described in Sections 99-9-3 through 99-9-7 may be had before justices of the peace in a prosecution or proceeding against a corporation for any offense cognizable before a justice of the peace. In case publication be necessary, the day of appearance may be fixed for such time as will allow the order to be published for the required period.

**SOURCES:** Codes, 1857, ch. 64, art. 271; 1871, § 2771; 1880, § 3021; 1892, § 1370; Laws, 1906, § 1442; Hemingway's 1917, § 1199; Laws, 1930, § 1222; Laws, 1942, § 2465.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

### § 99-9-11. Subpoenas for witnesses.

The first process, in all criminal causes, and in all courts, to compel the attendance of a witness, shall be a subpoena, directed to the sheriff or to some proper officer of the county where the witness may reside, stating the time and place for the appearance of the witness, the parties to the cause, and the party at whose instance the witness is subpoenaed. The names of the witnesses, if there be not exceeding six of them, residing in the same county, shall be inserted in the same subpoena.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1(102); 1857, ch. 61, art. 194; 1871, § 761; 1880, § 1586; 1892, § 3449; Laws, 1906, § 3948; Hemingway's 1917, § 2955; Laws, 1930, § 3001; Laws, 1942, § 1883.

**Cross References** — Power of chancery court to issue subpoenas for witnesses, see § 9-5-85.

Issuance of subpoenas by justice of the peace, see § 11-9-115.

Issuance of subpoenas in habeas corpus proceedings, see § 11-43-49.

Subpoenas for witnesses in civil actions, see § 13-3-93.

Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.

Witness fees generally, see § 25-7-47.

Service of subpoena, see § 99-9-17.

Issuance of subpoenas by conservators of peace, see § 99-15-9.

Right to subpoena witnesses under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Subpoenas, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 2.01.

Expert witnesses, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.01.

## JUDICIAL DECISIONS

### 1. In general.

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state in locating witness for interview and also secure witness' attendance at court. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

Failure of counsel to issue subpoenas even for friendly, favorable witnesses is perilous, because if for some reason witness fails to appear, prerequisite for continuance is that he or she is either under process or reasonable effort has been

made to serve him or her with subpoena. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

In order to be entitled to continuance because of absent witness, counsel must demonstrate to court that he or she "has used due diligence" to secure witness' presence; embraced therein is requirement that counsel has made timely effort to place absent witness under subpoena. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

## RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:703, (subpoena issued by court).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 62-64, (subpoena).

**CJS.** 98 C.J.S., Witnesses §§ 20, 25 et seq.

**Lawyers' Edition.** Accused's right, under Federal Constitution's Sixth Amendment, to compulsory process for obtaining witnesses in accused's favor—Supreme Court cases. 98 L. Ed. 2d 1074.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 11:1.

### § 99-9-13. Issuance of subpoena for witness to give deposition for use in another state.

Any commissioner or other person appointed, or to whom a commission may be directed, by any court without the limits of this state, to take the deposition of any witness residing or being in this state, shall have power to issue subpoenas for the witness to be examined, returnable at such time and place as the commissioner or other person may appoint.

**SOURCES:** Codes, 1857, ch. 61, art. 195; 1871, § 763; 1880, § 1587; 1892, § 3451; Laws, 1906, § 3950; Hemingway's 1917, § 2957; Laws, 1930, § 3003; Laws, 1942, § 1885.

### § 99-9-15. Subpoena to compel attendance of witness from nearby county during term.

If, during the session of any circuit court, there shall be wanted in any case or matter before the court, or before the grand jury, a witness who resides or may be found in any county within the state, and within one hundred (100) miles of the place where the court is being held, such court may order a subpoena or attachment for such witness, directed to the sheriff of the county in which the court is being held. The sheriff shall execute the process according to its command, in the county where such witness may be found, and the service shall be as valid as if effected in the county in which the court is being held. The court may, however, appoint some person not an officer to execute



and return such process, whose action in executing it shall be as lawful as if done by the sheriff, and who shall be entitled to the same fees therefor as the sheriff would be entitled to for executing the process.

**SOURCES:** Codes, 1880, § 1594; 1892, § 3452; Laws, 1906, § 3951; Hemingway's 1917, § 2958; Laws, 1930, § 3004; Laws, 1942, § 1886; Laws, 1936, ch. 250.

**Cross References** — Fees of sheriff generally, see § 25-7-19.

### RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:671, (application for attachment of witness to compel attendance).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Form 13, (application for attach-

ment of witness to compel attendance to testify).

**CJS.** 98 C.J.S., Witnesses §§ 20, 25 et seq.

## § 99-9-17. Service of subpoena.

Subpoenas shall be served personally as a summons is required to be served, and the person so subpoenaed shall appear.

**SOURCES:** Codes, 1857, ch. 61, art. 196; 1871, § 764; 1880, § 1588; 1892, § 3453; Laws, 1906, § 3952; Hemingway's 1917, § 2959; Laws, 1930, § 3005; Laws, 1942, § 1887.

### JUDICIAL DECISIONS

#### 1. In general.

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state

in locating witness for interview and also secure witness' attendance at court. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

### RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 12.

21 Am. Jur. Pl & Pr Forms, Witnesses, Forms 21:716-21:723, (affidavit of service of subpoena).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 74-81, (affidavit of service of subpoena).

**CJS.** 98 C.J.S., Witnesses §§ 26-29.

## § 99-9-19. Attachment for non-appearing subpoenaed witness.

If any person subpoenaed as a witness shall fail to appear and attend as required, an attachment shall be issued by order of the court or other authority before which he was subpoenaed to appear, returnable at such time as the court or authority may appoint. The court or authority shall, on ordering the attachment, direct whether the witness shall enter into bond for his appearance, and in what sum, and whether with or without sureties, which bond the

sheriff, or other officer by whom the attachment is executed, is authorized to take, payable to the state. In case the witness shall appear in answer to the attachment, the court may discharge him therefrom, on good cause shown, or may require him to enter into recognizance or bond for his appearance until discharged, to testify in the cause. In case the witness shall not appear, in pursuance of his recognizance or bond, the same proceedings shall be had as upon the forfeiture of a recognizance in a criminal case.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1(121); 1857, ch. 61, art. 197; 1871, § 765; 1880, § 1589; 1892, § 3454; Laws, 1906, § 3935; Hemingway's 1917, § 2960; Laws, 1930, § 3006; Laws, 1942, § 1888.

**Cross References** — Form of attachment of witness issued by justice of the peace, see § 11-9-121.

Attachment of defaulting witness in habeas corpus proceeding, see § 11-43-49.

Another section derived from same 1942 code section, see § 13-3-103.

### RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:737, (attachment of witness for failure to obey subpoena).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 96, 97, (attachment of witness for failure to obey subpoena).

**CJS.** 98 C.J.S., Witnesses §§ 57, 58.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 11:1.

## § 99-9-21. Subpoenaed witness to attend until discharged; scire facias for defaulters.

Every witness subpoenaed in any criminal case, shall attend, from day to day, and from term to term without further notice, until discharged by the court or by the party at whose instance he was subpoenaed, and in default thereof he shall be fined by the court not more than five hundred dollars, and a scire facias shall issue thereon, requiring him to appear at the next term of the court, to show cause why the fine should not be made absolute. If cause be not then shown, the fine shall be made final. In criminal cases, the court may cause the witnesses on either side to be bound by bond or recognizance to appear and testify until discharged.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1(103, 105); 1857, ch. 61, arts. 196, 198; 1871, § 766; 1880, §§ 1590, 1591, 1592; 1892, § 3455; Laws, 1906, § 3954; Hemingway's 1917, § 2961; Laws, 1930, § 3007; Laws, 1942, § 1889.

### JUDICIAL DECISIONS

#### 1. In general.

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state in locating witness for interview and also

secure witness' attendance at court. *Triplet v. State*, 666 So. 2d 1356 (Miss. 1995).

Where the witness's deliberate and wilful refusal to appear and testify constituted constructive contempt, the power of

the court to punish this contempt was not limited by the terms of this statute. *Buskirk v. State*, 321 So. 2d 295 (Miss. 1975).

After the state rested its case in a prosecution for assault and battery with an

intent to kill, the district attorney had authority to release a witness subpoenaed by the state, who had not been subpoenaed by the defendant. *Nicholson v. State*, 230 Miss. 267, 92 So. 2d 654 (1957).

### RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:735, (scire facias on judgment against witness failing to obey subpoena).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Form 93, (scire facias on judgment against witness failing to obey subpoena).

### § 99-9-23. Witness subpoenaed in vacation to appear before grand jury.

Any district attorney or conservator of the peace may apply to the clerk of the circuit court in vacation for writs of subpoena for any witness to attend before the grand jury. It shall be the duty of the clerk to issue all subpoenas thus applied for, and it shall be the duty of all witnesses subpoenaed to attend in obedience to the command of such subpoena. If such witnesses fail to appear, the foreman of the grand jury may apply for and obtain an attachment, as in other cases of defaulting witnesses, and such witnesses shall be liable to all the penalties to which any defaulting witness is subject.

**SOURCES:** Codes, 1880, § 1678; 1892, § 3456; Laws, 1906, § 3955; Hemingway's 1917, § 2962; Laws, 1930, § 3008; Laws, 1942, § 1890; Laws, 1983, ch. 499, § 27, eff from and after July 1, 1983.

**Cross References** — Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.

Grand jury convening in vacation, see Miss. Unif. Cir. & County Ct. Prac. R. 7.02.

### RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:704, (subpoena issued by court to appear before grand jury).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 63, 64 (subpoena to appear before grand jury).

38 Am. Jur. Trials, Representing the Grand Jury Target Witness, §§ 1 et seq.

**CJS.** 98 C.J.S., Witnesses §§ 20, 25 et seq., 57, 58.

### § 99-9-25. Attachment of subpoenaed witnesses failing to appear before grand jury.

In all cases where process to bring witnesses before the grand jury shall be executed, and the witness shall fail to attend, the clerk shall, on the order of the judge or application of the district attorney or any member of the grand jury, issue an attachment for such witness, returnable immediately, or, if the



court shall so direct, to the next term. Bond may be required, and fine imposed and proceedings had thereon as in other cases of defaulting witnesses.

**SOURCES:** Codes, 1880, § 1679; 1892, § 3457; Laws, 1906, § 3956; Hemingway's 1917, § 2963; Laws, 1930, § 3009; Laws, 1942, § 1891.

**Cross References** — Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.

## RESEARCH REFERENCES

**ALR.** Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

**CJS.** 98 C.J.S., Witnesses §§ 57, 58.

## § 99-9-27. Uniform witness attendance law; short title.

Sections 99-9-27 through 99-9-35 may be cited as “uniform law to secure the attendance of witnesses from without the state in criminal cases.”

**SOURCES:** Codes, 1942, § 1892; Laws, 1938, ch. 261.

## JUDICIAL DECISIONS

### 1. In general.

A conviction for selling three capsules of heroin would be reversed where the state had agreed to have an essential out-of-state witness present and failed to do so,

even though the witness could have been subpoenaed under Uniform Witness Act. *Sullivan v. State*, 364 So. 2d 277 (Miss. 1978).

## RESEARCH REFERENCES

**ALR.** Sufficiency of evidence to support or require finding that in-state witness in criminal case is “material and necessary” justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 7.  
**CJS.** 98 C.J.S., Witnesses §§ 14, 16, 18, 19.

**Practice References.** Young, *Trial Handbook for Mississippi Lawyers* § 11:1.

## § 99-9-29. Definitions.

“Witness” as used in Sections 99-9-27 through 99-9-35 shall include a person whose testimony is relevant and material and desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

“State” as used in Sections 99-9-27 through 99-9-35 shall include any territory of the United States and the District of Columbia.

**SOURCES:** Codes, 1942, § 1893; Laws, 1938, ch. 261.

## RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 7.      **Practice References.** Young, Trial  
**CJS.** 98 C.J.S., Witnesses §§ 14, 16, 18,      Handbook for Mississippi Lawyers § 11:1.  
19.

**§ 99-9-31. Summoning witnesses in this state to testify in another state.**

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing, the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where the grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing, and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the summoned witness, after being paid or tendered by some properly authorized person, the sum of ten (\$.10) cents a mile for each mile and five (\$5.00) dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

**SOURCES:** Codes, 1942, § 1894; Laws, 1938, ch. 261.

**Cross References** — Witness from another state summoned to testify in this state, see § 99-9-33.

### RESEARCH REFERENCES

**ALR.** Sufficiency of evidence to support or require finding that in-state witness in criminal case is “material and necessary” justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses

from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 7.

**CJS.** 98 C.J.S., Witnesses §§ 14, 16, 18, 19.

### § 99-9-33. Witness from another state summoned to testify in this state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness shall be required. This certificate shall be presented to a judge of a court of record in the county or parish in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him, and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten (\$.10) cents a mile for each mile and five (\$5.00) dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

**SOURCES:** Codes, 1942, § 1895; Laws, 1938, ch. 261.



**Cross References** — Witness in this state summoned to testify in another state, see § 99-9-31.

## JUDICIAL DECISIONS

### 1. In general.

There is no method by which an out-of-state witness can be paid, and the trial court is without authority to force a witness for the defense to leave a foreign state to testify in Mississippi. *Chandler v. State*, 272 So. 2d 641 (Miss. 1973).

Code 1942, § 1895 does not authorize a court to procure the attendance and testimony of witnesses for an accused at public expense, and an accused is not deprived of his constitutional right to compulsory process and to due process of law and equal protection of the laws by the refusal of a court to order an allowance for the payment of witnesses sought by the defendant to be subpoenaed from another state pursuant to such section. *Diddlemeyer v.*

*State*, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

In a criminal prosecution, where the trial court was without authority to compel the attendance of witnesses requested by the defendant under any circumstances, so long as they were outside the state, the court's denial of compulsory process for the attendance of three witnesses confined in penitentiaries in other states, and a fourth witness who resided out of the state, did not constitute a denial of due process or equal protection. *Diddlemeyer v. State*, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

## RESEARCH REFERENCES

**ALR.** Uniform Act to secure attendance of witnesses from without the state in criminal proceedings. 44 A.L.R.2d 732.

Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of subpoena duces tecum. 7 A.L.R.4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 7.

**CJS.** 98 C.J.S., Witnesses §§ 14, 16, 18, 19.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 11:3.

## § 99-9-35. Exemption from arrest and service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not, while in this state pursuant to such summons or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons or order to attend and testify in that state or while returning therefrom, he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with

matters which arose before his entrance into this state under the summons or order.

**SOURCES:** Codes, 1942, § 1896; Laws, 1938, ch. 261.

#### RESEARCH REFERENCES

**ALR.** Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

Enforceability of agreement by law enforcement officials not to prosecute if ac-

cused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

**Am Jur.** 81 Am. Jur. 2d, Witnesses § 7.

**CJS.** 98 C.J.S., Witnesses §§ 14, 16, 18, 19.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 11:1, 11:3.

#### § 99-9-37. Uniformity of interpretation.

Sections 99-9-27 to 99-9-35 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them.

**SOURCES:** Codes, 1942, § 1897; Laws, 1938, ch. 261.

## CHAPTER 11

### Jurisdiction and Venue

SEC.	
99-11-1.	Jurisdiction of crimes generally.
99-11-3.	Local jurisdiction; venue; venue regarding indictments returned by state grand jury.
99-11-5.	Extent of criminal jurisdiction of State of Mississippi.
99-11-7.	Concurrent jurisdiction with Arkansas.
99-11-9.	Jurisdiction of paternity proceedings.
99-11-11.	Embezzlement.
99-11-13.	Kidnapping.
99-11-15.	Offenses commenced out of and consummated in state.
99-11-17.	Offenses commenced in and consummated out of state.
99-11-19.	Offenses committed partly in one county and partly in another.
99-11-21.	Occurrence in one jurisdiction causing death in another.
99-11-23.	Stolen property carried into state or carried from one county to another.
99-11-25.	Aiding, encouraging or causing commission of crime within state by person while out of state.
99-11-27.	Former acquittal or conviction in another jurisdiction.
99-11-29.	Acquittal for variance between indictment and proof or on exception to form.
99-11-31.	Acquittal on the merits.
99-11-33.	Acquittal or conviction by justice of the peace for misdemeanor not to bar prosecution for felony.
99-11-35.	No acquittal for defects of form.
99-11-37.	Cognizance and jurisdiction of crimes committed in particular district in Harrison County or Hinds County.
99-11-39.	Transmittal of records on change of venue or transfer or removal of trial in Harrison County or Hinds County.

#### § 99-11-1. Jurisdiction of crimes generally.

The several courts of justice organized under the constitution and laws of this state, shall possess the sole and exclusive jurisdiction of trying and punishing all persons in the manner prescribed by law, for crimes and offenses committed in this state, except such as are exclusively cognizable by the courts deriving their jurisdiction from the constitution and laws of the United States.

**SOURCES:** Codes, 1857, ch. 64, art. 240; 1871, § 2750; 1880, § 2990; 1892, § 1328; Laws, 1906, § 1400; Hemingway's 1917, § 1148; Laws, 1930, § 1175; Laws, 1942, § 2418.

**Cross References** — Definition of "offense," see § 1-3-37.

Concession of jurisdiction to land acquired by United States, see §§ 3-5-5, 3-5-9.

Jurisdiction of circuit court generally, see § 9-7-81.

Jurisdiction of county court generally, see § 9-9-1.

Jurisdiction of justices of the peace in civil cases, see § 9-11-9.

Venue of civil actions generally, see §§ 11-11-1 et seq.

Misdemeanors under state penal laws being criminal offenses against municipal corporations, see § 21-13-19.

County in which motions may be made or a guilty plea entered with respect to criminal cases in circuit courts, see § 99-15-24.



Jurisdiction of justices of the peace over criminal case, see § 99-33-1.

Jurisdiction under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-7.

Civil and criminal procedure in federal district courts sitting in Mississippi, see Uniform Local Rules of U.S. District Courts for Northern and Southern Districts of Mississippi.

## JUDICIAL DECISIONS

### 1. In general.

No jeopardy attached upon the impaneling and swearing in of the first jury, since the circuit court was without jurisdiction to try the minor defendant for manslaughter, and she was not placed in jeopardy for a second time by her subsequent trial for murder and conviction of manslaughter, after she had been certified by the youth court to the circuit court for trial as an adult. *Butler v. State*, 489 So. 2d 1093 (Miss. 1986).

Although the state had given its consent for the United States to purchase certain

of its lands for the use and benefit of Choctaw Indians, it did not give its consent for the United States to acquire civil and criminal jurisdiction over the land or the Indians and it thereby retained jurisdiction for its own courts. *Tubby v. State*, 327 So. 2d 272 (Miss. 1976).

Circuit courts have all the common-law power of English criminal courts to examine, try and deliver every prisoner who is in jail or under charge within the jurisdiction of the court. *State v. Thornhill*, 251 Miss. 718, 171 So. 2d 308 (1965).

## RESEARCH REFERENCES

**ALR.** What is proper venue under Rule 18 of the Federal Rules of Criminal Procedure for offense of bail jumping. 52 A.L.R. Fed. 901.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 480 et seq., 503 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 141 et seq.

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and Others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Manual (Michie).

## § 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury.

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

(2) The provisions of subsection (1) of this section shall not apply to indictments returned by a state grand jury. The venue of trials for indictments

returned by a state grand jury shall be as provided by the State Grand Jury Act. This subsection shall stand repealed from and after July 1, 2011.

**SOURCES:** Codes, 1857, ch. 64, art. 241; 1871, § 2751; 1880, § 2991; 1892, § 1329; Laws, 1906, § 1401; Hemingway's 1917, § 1149; Laws, 1930, § 1176; Laws, 1942, § 2419; Laws, 1981, ch. 471, § 54; Laws, 1982, ch. 423, § 28; Laws, 1993, ch. 352, § 1; Laws, 1993, ch. 553, § 22; Laws, 1998, ch. 382, § 26; Laws, 1999, ch. 480, § 26; Laws, 2002, ch. 471, § 26; Laws, 2005, ch. 506, § 1, eff from and after passage (approved Apr. 20, 2005.)

**Amendment Notes** — The 2005 amendment reenacted and amended the section by extending the date of the repealer in (2) from "July 1, 2005" until "July 1, 2011."

**Cross References** — Criminal accused's right to trial in county where offense was committed, see Miss. Const. Art. 3, § 26.

State Grand Jury Act, see §§ 13-7-1 et seq.

Offenses committed partly in one county and partly in another, see § 99-11-19.

Occurrence in one jurisdiction causing death in another, see § 99-11-21.

Stolen property carried into state or carried from one county to another, see § 99-11-23.

County in which motions may be made or a guilty plea entered with respect to criminal cases in circuit courts, see § 99-15-24.

## JUDICIAL DECISIONS

1. In general.
2. Proof of venue, generally.
3. —Judicial notice.
4. —Jurisdiction of circuit court.
5. —Jurisdiction of county court.
6. —Rebuttable presumption.
7. Raising question as to venue on appeal.

### 1. In general.

A murder defendant was subject to jurisdiction in either the first or second judicial district of a county where the victim's abduction began in the second judicial district while the slaying occurred in the first judicial district. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

Venue for murder prosecution is proper in county in which body of victim is found. *Hickson v. State*, 472 So. 2d 379 (Miss. 1985).

A convict charged with escaping and breaking prison must be indicted and tried in the county where the crime is alleged to have been committed, unless the venue is changed as provided by law, and if the alleged offense occurred in a county other than the one in which the state penitentiary is located an indictment returned in the county of the peni-

tentiary's situs must be quashed. *Everitt v. Jack*, 192 So. 2d 698 (Miss. 1966).

In matters of criminal jurisdiction, each judicial district must be treated as a separate county. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

In a county having two judicial districts an indictment for grand larceny must charge the district in which the crime was committed. *Evans v. State*, 144 Miss. 1, 108 So. 725 (1926).

Laws 1910, ch. 141 [Code 1942, §§ 2420, 2421], seems to engraft an exception to this statute but does not violate Miss. Const. Art. 3, § 26. *State v. Cunningham*, 102 Miss. 237, 59 So. 76, Am. Ann. Cas. 1914D, 182 (1912).

A defendant must be indicted and tried in the judicial district of the county in which the offense was committed. *Isabel v. State*, 101 Miss. 371, 58 So. 1 (1912).

Where an offense is committed and before any prosecution is begun a new county is created including the territory where the crime was enacted, jurisdiction can be properly exercised in the new county. *Murrah v. State*, 51 Miss. 675 (1875).

## 2. Proof of venue, generally.

In a case where defendant was pursued by an officer for speeding on the wrong side of the road, venue in that county was proper under Miss. Code Ann. § 99-11-3(1), even though he was stopped in another county, because that was where the offense was first committed. *Ouzts v. State*, 947 So. 2d 1005 (Miss. Ct. App. 2006).

In defendant's manslaughter case, venue was properly established because the evidence showed that defendant shot the victim on or near the Lobutcha Creek Bridge, near the Leake County-Attala County line, defendant placed her body in the trunk of his car, drove northward, and left her body in Attala County. *McBride v. State*, 934 So. 2d 1033 (Miss. Ct. App. 2006).

In a prosecution for murder by the defendant of her own infant, evidence was sufficient to establish venue where an officer testified that the defendant gave him a statement in which she indicated that she was returning from a certain city on a particular highway and had just passed a specific exit when her baby began to have trouble breathing; although it was a close call, a jury was properly permitted to disbelieve her statement for the purposes of determining guilt, while nevertheless using the statement as a basis for establishing venue. *Hill v. State*, 797 So. 2d 914 (Miss. 2001).

Evidence that the responding police officer was with the Clarksdale Police Department provided the necessary evidence of proper venue in Coahoma County, especially where venue was not a contested fact at trial. *Thomas v. State*, 784 So. 2d 247 (Miss. Ct. App. 2000).

In a prosecution for "headlighting" deer, the evidence was sufficient to establish venue, even though there was insufficient evidence to establish venue in the State's case-in-chief, where rebuttal testimony by the State sufficiently proved venue, and there was no surrebuttal by the defendant to the contrary. *Smith v. State*, 646 So. 2d 538 (Miss. 1994).

Venue of a crime can be proved by circumstantial evidence as well as direct evidence. *Sanders v. State*, 286 So. 2d 825 (Miss. 1973).

The state failed to prove venue at a trial for assault and battery with intent to kill and murder, where it produced a record showing that the assault took place within a few feet of an automobile parked on a particular college campus, but did not show that the named college was located in a specific county or even within the state. *Jackson v. State*, 246 So. 2d 553 (Miss. 1971).

In a criminal prosecution, venue is not proved by a witness who testifies that he guesses venue is in a certain named county. *Turner v. State*, 220 So. 2d 295 (Miss. 1969), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85 (1969).

In a homicide prosecution, where a state's witness testified that he guessed that the crime was committed in Jackson County and, after an objection by the defense counsel, stated positively that the crime occurred in Jackson County, and where this was the only evidence offered as to venue by the state, the correction was properly permitted and the evidence was sufficient to meet the burden placed on the state to establish venue. *Turner v. State*, 220 So. 2d 295 (Miss. 1969), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85 (1969).

The affidavit for a search warrant and the search warrant are admissible to show only that the search was lawful, and do not constitute any proof of venue. *Clark v. State*, 230 Miss. 143, 92 So. 2d 452 (1957).

This section [Code 1942, § 2419] eliminates the requirement that proof of venue be beyond a reasonable doubt in cases where there is a conflict in evidence as to which of the two or more counties or districts in Mississippi is the place of the offense, but it has no application where the question is whether or not the alleged criminal act was committed in Mississippi. *Presley v. State*, 217 Miss. 112, 63 So. 2d 551 (1953).

Venue of crime was established as being in first judicial district of Jones County, Mississippi, by evidence showing that decedent was last seen alive by accused in Jones County, near the place where his body was found in same county, and that he had received a blow on head breaking skull, small fragments of which were lying on the ground. *Poore v. State*, 205 Miss.



528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949), motion granted, 40 So. 2d 172 (Miss. 1949).

Venue of crime may be shown by circumstantial evidence. *Holloway v. State*, 199 Miss. 356, 24 So. 2d 857 (1946); *Poore v. State*, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949).

On proof of venue in the trial of a case even if the evidence leaves the venue in doubt the supreme court is precluded from reversing the case. *Hill v. State*, 112 Miss. 375, 73 So. 66 (1916).

Under this section [Code 1942, § 2419] there must be proof where the offense was committed, if it is near the county line and the proof is doubtful as to which county it was committed in, the doubt will not avail to acquit the defendant. *Isabel v. State*, 101 Miss. 371, 58 So. 1 (1912).

### 3. —Judicial notice.

Appellate court affirmed defendant's conviction despite defendant's claims that venue was never proved because the victim testified that the assaults occurred while defendant was living with the victim and her mother, all of the homes that they lived in during the relevant time, although in different cities, were within one specific county, venue of a criminal offense is in the county where the crime was committed, and the appellate court could take judicial notice on appeal that a certain city was located within a particular county. *Hensley v. State*, 912 So. 2d 1083 (Miss. Ct. App. 2005).

Judicial notice may be taken that a certain street is in a specific county, at least if the street has a sufficiently unusual name. *Thomas v. State*, 784 So. 2d 247 (Miss. Ct. App. 2000).

Venue was not established by the court taking judicial notice of the fact that the college at which the alleged assault took place was located in a particular county, for it is a dangerous practice to invoke the doctrine of judicial notice in criminal

cases, and before judicial notice can be available as to matters of venue it must be a matter of such general or common knowledge that every man may know it. *Jackson v. State*, 246 So. 2d 553 (Miss. 1971).

While the supreme court may take judicial notice that a town or city is in a certain county, it will not take judicial notice of the supervisor's district in which a town or city is located. *Clark v. State*, 230 Miss. 143, 92 So. 2d 452 (1957).

### 4. —Jurisdiction of circuit court.

Where a county circuit court acquired authority to proceed against the defendant when the grand jury returned indictments charging the essential elements of a criminal offense committed in the county against the defendant and served those indictments upon him, such court maintained jurisdiction to accept the defendant's guilty plea and impose an appropriate sentence. *Edwards v. State*, 749 So. 2d 291 (Miss. Ct. App. 1999).

When a criminal case originates in the justice of the peace court and is appealed to the circuit court for trial de novo, the circuit court does not have jurisdiction unless the proof shows that the offense was committed in the district where the case originated. *Clark v. State*, 230 Miss. 143, 92 So. 2d 452 (1957).

Defendants were not entitled to a reversal of conviction on ground that evidence failed to show that circuit court of county had jurisdiction where offense was committed near county line but evidence was conflicting as to county in which offense was committed. *Phillips v. State*, 177 Miss. 370, 171 So. 24 (1936).

### 5. —Jurisdiction of county court.

To confer jurisdiction on county court in misdemeanor case, state need only allege and prove crime was committed in county. *Webb v. State*, 158 Miss. 715, 131 So. 262 (1930).

### 6. —Rebuttable presumption.

The fact that a victim was found dead in Newton County raised a rebuttable presumption that all or part of the homicide took place in Newton County, and, since the defendant failed to offer anything to rebut this presumption or make unrea-

sonable the inference, such evidence was sufficient to undergird a finding that venue was proper in Newton County in accordance with § 99-11-3. *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984).

### 7. Raising question as to venue on appeal.

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where he attempted to burn the structure; venue was proper pursuant to U.S. Const. Art. III, § 2 cl. 3, U.S. Const. Amend. VI, and Miss. Const. Art. 3, § 26 because there was nothing conceptually outrageous or bizarre in bringing charges in the county for an attempt to burn a building in that county, Miss. Code Ann. § 99-11-3(1). *Holbrook v. State*, 877 So. 2d 525 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1340, 161 L. Ed. 2d 141 (2005).

Although defendant claimed on appeal that he was prosecuted in the wrong county, he raised this issue for the first time on appeal, having never done so at trial; moreover, the crime was possession of a controlled substance and the evidence was that he did not obtain it at the end of the chase, but surely possessed it at the beginning, at the end, and at every point in between, so that its discovery at the point where the chase ended did not dilute the inference that he must have possessed the substance when the chase began in Oktibbeha County, Mississippi. *Burnett v. State*, 876 So. 2d 409 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

On an appeal from a conviction in a justice of peace court for the unlawful possession of intoxicating liquor, or other

misdeemeanors, the state must prove in what district of the county the offense occurred; and the question of whether or not venue was proved may be raised for the first time in the supreme court. *Jones v. State*, 230 Miss. 887, 94 So. 2d 234 (1957), overruled on other grounds, *Mattox v. State*, 243 Miss. 402, 137 So. 2d 920 (1962).

When a criminal case originates in the justice of peace court and is appealed to the circuit court for trial de novo, the circuit court does not have jurisdiction unless the proof shows that the offense was committed in the district where the case originated, and this question of venue may be raised for the first time in the supreme court. *Clark v. State*, 230 Miss. 143, 92 So. 2d 452 (1957).

Failure of the state in a criminal case to prove venue is jurisdictional error and the supreme court will reverse although the point may be for the first time raised in the supreme court. *Kyle v. Town of Calhoun City*, 123 Miss. 542, 86 So. 340 (1920).

In a criminal case venue is jurisdictional and must be proved and may be raised for the first time on appeal to the supreme court. *Quillen v. State*, 10 Miss. (2 S. & M.) 2735A, 64 So. 736 (1914); *Norwood v. State*, 129 Miss. 813, 93 So. 354 (1922); *Slaton v. State*, 134 Miss. 419, 98 So. 838 (1924); *Sullivan v. State*, 136 Miss. 773, 101 So. 683 (1924); *Sandifer v. State*, 136 Miss. 836, 101 So. 862 (1924); *Pickle v. State*, 137 Miss. 112, 102 So. 4 (1924); *Carpenter v. State*, 102 So. 184 (Miss. 1924); *Monroe v. State*, 104 So. 451 (Miss. 1925); *Griffin v. State*, 140 Miss. 175, 105 So. 457 (1925); *Dorsey v. State*, 141 Miss. 600, 106 So. 827 (1926); *Norris v. State*, 143 Miss. 365, 108 So. 809 (1926).

## ATTORNEY GENERAL OPINIONS

Where alleged perjured testimony was given in Oktibbeha County, proper jurisdiction over the matter would lie in the

Circuit Court of that county. Burns, Nov. 5, 2004, A.G. Op. 04-0544.

## RESEARCH REFERENCES

**ALR.** Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 A.L.R.3d 988.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 480 et seq., 503 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 218 et seq.

### § 99-11-5. Extent of criminal jurisdiction of State of Mississippi.

The criminal jurisdiction of the State of Mississippi is hereby extended as follows: Beginning at a point on the Mississippi River where the northern boundary line of the State of Mississippi intersects the thread, or middle of the stream of said river, and extending due west along a line parallel with, and in extension of the northern boundary line of the State of Mississippi to the west bank of said river, thence south along said bank and following the meandering thereof to the southern boundary line of the State of Arkansas, thence east to the thread, or middle of the stream of said river.

**SOURCES:** Codes, Hemingway's 1917, § 1150; Laws, 1930, § 1177; Laws, 1942, § 2420; Laws, 1910, ch. 141.

**Cross References** — How far counties on Mississippi River extend, see § 3-3-5.

### JUDICIAL DECISIONS

#### 1. In general.

This section [Code 1942, § 2420] does not give Mississippi the power to enforce

the laws of Arkansas. *State v. Cunningham*, 102 Miss. 237, 59 So. 76, Am. Ann. Cas. 1914D,182 (1912).

### RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. 2d, Criminal Law § 393.

**CJS.** 22 C.J.S., Criminal Law §§ 141 et seq.

### § 99-11-7. Concurrent jurisdiction with Arkansas.

The State of Mississippi, and her sister state, Arkansas, have concurrent criminal jurisdiction over all the waters, islands, and territory lying opposite them and between the east and west banks of said river and the north boundary line of the State of Mississippi and the south boundary line of the State of Arkansas, at their intersection with the Mississippi River.

**SOURCES:** Codes, Hemingway's 1917, § 1151; Laws, 1930, § 1178; Laws, 1942, § 2421; Laws, 1910, ch. 141.

**Cross References** — How far counties on Mississippi River extend, see § 3-3-5.

### RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. 2d, Criminal Law § 496.

**CJS.** 22 C.J.S., Criminal Law §§ 141 et seq.



## § 99-11-9. Jurisdiction of paternity proceedings.

The circuit court of the county in which an illegitimate child is born shall have jurisdiction of any action brought under section 97-29-11, Mississippi Code of 1972. No male person shall be convicted solely on the uncorroborated testimony of the female person giving birth to the child.

**SOURCES:** Codes, 1942, § 2018.6; Laws, 1964, ch. 341, §§ 1-4 (¶¶ 1-4).

**Cross References** — Uniform law on paternity, see §§ 93-9-1 et seq.

Person becoming natural parent of second illegitimate child guilty of misdemeanor, see § 97-29-11.

## § 99-11-11. Embezzlement.

When an embezzlement is committed it may be prosecuted in the county in which the money or property, or some part thereof, was received or converted by the accused, or in the county in which he was under obligation to pay over the funds or to deliver up the property.

**SOURCES:** Codes, 1892, § 1330; Laws, 1906, § 1402; Hemingway's 1917, § 1157; Laws, 1930, § 1182; Laws, 1942, § 2425.

**Cross References** — Criminal offense of embezzlement, see §§ 97-23-19 et seq.

### RESEARCH REFERENCES

**ALR.** Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 503 et seq.  
26 Am. Jur. 2d, Embezzlement § 62.

## § 99-11-13. Kidnapping.

Every person who shall be accused of kidnapping may be indicted and tried either in the county where the offense may have been committed, or in any county into or through which any person so kidnapped or confined shall have been taken while under such confinement.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3(28); 1857, ch. 64, art. 187; 1871, § 2650; 1880, § 2898; 1892, § 1331; Laws, 1906, § 1403; Hemingway's 1917, § 1158; Laws, 1930, § 1183; Laws, 1942, § 2426.

**Cross References** — Criminal offense of kidnapping, see §§ 97-3-51 et seq.

### JUDICIAL DECISIONS

#### 1. In general.

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the de-

fense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but

see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

### RESEARCH REFERENCES

**Am Jur.** 1 Am. Jur. 2d, Abduction and Kidnapping §§ 42, 43.      21 Am. Jur. 2d, Criminal Law §§ 503 et seq.

### § 99-11-15. Offenses commenced out of and consummated in state.

Where an offense is commenced out of this state and consummated in it, or where an offense is consummated in this state by any means or agency proceeding from a person out of this state, the person so commencing such offense or putting in operation such means or agency, although out of the state at the time such offense was actually consummated, shall be liable to indictment and punishment therefor in the county in which the offense was consummated.

**SOURCES:** Codes, 1857, ch. 64, art. 242; 1871, § 2752; 1880, § 2992; 1892, § 1332; Laws, 1906, § 1404; Hemingway's 1917, § 1159; Laws, 1930, § 1184; Laws, 1942, § 2427.

### JUDICIAL DECISIONS

#### 1. In general.

Venue was proper although state had offered no proof beyond reasonable doubt that sale or transfer of marijuana was contemplated in Alcorn County, because the gist of the crime was possession and prosecution was not required to prove specific place where defendant intended to

sell or transfer contraband, and because §§ 99-11-15 and 99-11-17, while not directly applicable, clearly showed intent of legislature to allow Mississippi Court to prosecute criminal acts that occur in state but which did not begin or were not intended to end in state. *Boches v. State*, 506 So. 2d 254 (Miss. 1987).

### RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 489, 490.

**CJS.** 22 C.J.S., Criminal Law §§ 224, 225.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 9:9.

### § 99-11-17. Offenses commenced in and consummated out of state.

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

**SOURCES:** Codes, 1857, ch. 64, art. 243; 1871, § 2753; 1880, § 2993; 1892, § 1333; Laws, 1906, § 1405; Hemingway's 1917, § 1160; Laws, 1930, § 1185; Laws, 1942, § 2428.

## JUDICIAL DECISIONS

### 1. In general.

Venue was proper although state had offered no proof beyond reasonable doubt that sale or transfer of marijuana was contemplated in Alcorn County, because the gist of the crime was possession and prosecution was not required to prove specific place where defendant intended to sell or transfer contraband, and because § 99-11-15 and this section, while not directly applicable, clearly showed intent of legislature to allow Mississippi Court to prosecute criminal acts that occur in state but which did not begin or were not intended to end in state. *Boches v. State*, 506 So. 2d 254 (Miss. 1987).

Mississippi had jurisdiction pursuant to this section over action charging murder committed during commission of kidnapping, even though actual murder took place in Alabama, since crime of capital

murder was commenced in Mississippi where defendant forcibly abducted victim and there was no break in chain of events leading from initial abduction to the actual murder. *Pruett v. Thigpen*, 665 F. Supp. 1254 (N.D. Miss. 1986), *aff'd*, 805 F.2d 1032 (5th Cir. Miss. 1986), *cert. denied*, 481 U.S. 1033, 107 S. Ct. 1964, 95 L. Ed. 2d 535 (1987).

Where an offense under this section [Code 1942, § 2428] was commenced within this state and consummated out of this state, the defendant may be indicted and tried in the county in this state in which the offense was commenced. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

Cashier embezzling funds of state bank on deposit in bank of another state was indictable in this state. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

## RESEARCH REFERENCES

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 489, 490.

**CJS.** 22 C.J.S., Criminal Law §§ 224, 225.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 9:9.

### § 99-11-19. Offenses committed partly in one county and partly in another.

When an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which said offense was commenced, prosecuted, or consummated, where prosecution shall be first begun.

**SOURCES:** Codes, 1857, ch. 64, art. 244; 1871, § 2754; 1880, § 2994; 1892, § 1334; Laws, 1906, § 1406; Hemingway's 1917, § 1161; Laws, 1930, § 1186; Laws, 1942, § 2429.

**Cross References** — Application of this section to aircraft piracy cases, see § 97-25-55.

Occurrence in one jurisdiction causing death in another, see § 99-11-21.

Stolen property carried into state or carried from one county to another-where offender may be indicted and tried, see § 99-11-23.



## JUDICIAL DECISIONS

1. In general.
2. Jurisdiction of court in which prosecution first begun.

### 1. In general.

Post-conviction relief was denied based on a venue challenge because at least part of the offense of statutory rape occurred in a county where defendant picked his victim up before having intercourse in another county, pursuant to Miss. Code Ann. § 99-11-19; moreover, defendant chose to enter a plea after being informed of a discrepancy regarding the issue of venue. *Plummer v. State*, — So. 2d —, 2007 Miss. App. LEXIS 166 (Miss. Ct. App. Mar. 20, 2007).

Although defendant claimed on appeal that he was prosecuted in the wrong county, he raised this issue for the first time on appeal, having never done so at trial; moreover, the crime was possession of a controlled substance and the evidence was that he did not obtain it at the end of the chase, but surely possessed it at the beginning, at the end, and at every point in between, so that its discovery at the point where the chase ended did not dilute the inference that he must have possessed the substance when the chase began in Oktibbeha County, Mississippi. *Burnett v. State*, 876 So. 2d 409 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

In a prosecution for conspiracy to possess morphine and to commit grand larceny, possession of morphine, and aggravated assault, where testimony showed that defendants conspired to steal morphine in one county, and that their assault victim was found unconscious and injured in a second county, the evidence was sufficient to establish jurisdiction in the second county. *Stubbs v. State*, 845 So. 2d 656 (Miss. 2003).

The state properly elected a county as the venue in which to prosecute the defendant for murder in the course of kidnapping where it chose the county in which the victim was seen entering the defendant's truck, rather than the county in which the victim was killed. *Hughes v. State*, 735 So. 2d 238 (Miss. 1999), cert.

denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

A murder defendant was subject to jurisdiction in either the first or second judicial district of a county where the victim's abduction began in the second judicial district while the slaying occurred in the first judicial district. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. *McKorkle v. State*, 305 So. 2d 361 (Miss. 1974).

Venue of a bribery prosecution is in the county in which an offer was made and the amount of the bribe tendered to an intermediary, though the offer was originally made to the intermediary in another county, and there communicated to the officer sought to be bribed. *McLemore v. State*, 241 Miss. 664, 126 So. 2d 236 (1961).

Second judicial district of Hinds County was proper venue for prosecution for robbery when accused stopped truck, carrying bootleg liquor, in Claiborne County, forced driver of truck to turn over truck to one of defendants and occupy car with other defendant, which car followed truck, keeping within sight of it, until truck reached second judicial district of Hinds County where truck was driven beyond sight of its owner, unloaded, and later returned to him. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Venue of prosecution for uttering forged teacher's license held properly laid in county where license was mailed by accused, notwithstanding license was received in another county where contract was consummated by correspondence originating in county from which license was mailed. *Bradford v. State*, 171 Miss. 8, 156 So. 655 (1934).

Accessory before fact to robbery is indictable and punishable as principal in county wherein robbery was consummated, though not in such county at time. *Watson v. State*, 166 Miss. 194, 146 So. 122 (1933).

Where a crime is composed of several elements, and a material one exists in either of two counties, the courts of either county may take jurisdiction of the entire crime. *Murray v. State*, 98 Miss. 594, 54 So. 72 (1911).

Venue of prosecution of the crime of false pretense in selling cotton raised in one county and sold in another under false pretenses was in county where sale occurred. *Murray v. State*, 98 Miss. 594, 54 So. 72 (1911).

## **2. Jurisdiction of court in which prosecution first begun.**

Dismissal of the inmate's motion for post-conviction relief without a hearing was appropriate under Miss. Code Ann. § 99-11-19 because jurisdiction was proper in Alcorn county even though the victim's ultimate death might not have occurred there; the commission of his crimes began in that county. *Moss v. State*, 940 So. 2d 949 (Miss. Ct. App. 2006).

Defendant's convictions for kidnapping and sexual battery were proper where jurisdiction in the circuit court was appropriate pursuant to Miss. Code Ann. § 99-11-19 because the circuit court was in the county from which the victim was kidnapped. *Winding v. State*, 908 So. 2d 163 (Miss. Ct. App. 2005).

In a prosecution for touching a child for lustful purposes in which it was not clear whether the crime was committed in one or the other of two judicial districts of a county, venue was properly set in the judicial district in which the automobile trip during which the crime was committed was commenced; the statute permitted a conviction in either judicial district of the county since, if the crime occurred, it was committed in one of those two districts. *McGowan v. State*, 742 So. 2d 1183 (Miss. Ct. App. 1999).

If one accused of murder is indicted in the county where the death occurred, he can afterward be indicted in another county where the fatal blow was struck, provided the first indictment had been

dismissed. *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

Embezzlement of some pulp wood was partly committed in the county where prosecution was commenced, and venue there was proper, where the truck carrying the embezzled wood was loaded in the county and, while it was still there, the defendant gave an order to the driver as to where to deliver it. *Bass v. State*, 328 So. 2d 665 (Miss. 1976).

Where the promise of marriage occurred in Forrest County and the act of intercourse occurred in Jones County, since both of these acts constituted essential elements of the offense of seduction, the jurisdiction thereof was governed by this section [Code 1942, § 2429], and it being proper to begin prosecution in either county, the circuit court of Forrest County had jurisdiction. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

Preliminary proceeding in robbery prosecution did not constitute beginning of prosecution in first district of Hinds County, within meaning of this section [Code 1942, § 2429] when county attorney presented information in county court, caption of which contained words: "County Court July Term A.D. 1948, First Judicial District, Hinds County," but which averred county attorney was informed and charged offense was committed in Hinds County, and order of county judge binding defendants over to await action of grand jury of second judicial district contained statement "court being advised in the premises," as it must be presumed court inquired into matter and was satisfied offense was committed in second district. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Where fatal blow occurred in Tennessee and deceased died in Mississippi, Mississippi court had jurisdiction of murder prosecution though assault prosecution had been previously instituted in Tennessee, since statute did not refer to interstate crimes. *Caldwell v. State*, 176 Miss. 80, 167 So. 779 (1936).

Where crime committed partly in one

county and partly in another of this state, the proper court of either county has jurisdiction thereof and the one in which prosecution is first begun has full and complete jurisdiction thereof. *Atkinson v. State*, 132 Miss. 377, 96 So. 310 (1923), overruled on other grounds, *Simons v. State*, 568 So. 2d 1192 (Miss. 1990).

## RESEARCH REFERENCES

**ALR.** Construction and effect of statutes providing for venue of criminal case in either county, where crime is committed partly in one county and partly in another. 30 A.L.R.2d 1265.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Venue in rape cases where crime is

committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another. 11 A.L.R.4th 704.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 494 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 9:9.

## § 99-11-21. Occurrence in one jurisdiction causing death in another.

Where the mortal stroke or other cause of death occurs or is given or administered in one county, and the death occurs in another county, the offender may be indicted and tried in either county; and so, also, if the mortal stroke or cause of death occur or be given or administered in another state or country and the death happen in this state, the offender may be indicted and tried in the county in which the death happened.

**SOURCES:** Codes, 1857, ch. 64, art. 246; 1871, § 2756; 1880, § 2996; 1892, § 1335; Laws, 1906, § 1407; Hemingway's 1917, § 1162; Laws, 1930, § 1187; Laws, 1942, § 2430.

**Cross References** — Offenses committed partly in one county and partly in another, see § 99-11-19.

## JUDICIAL DECISIONS

### 1. In general.

In defendant's manslaughter case, venue was properly established because the evidence showed that defendant shot the victim on or near the Lobutchka Creek Bridge, near the Leake County-Attala County line, defendant placed her body in the trunk of his car, drove northward, and left her body in Attala County. *McBride v. State*, 934 So. 2d 1033 (Miss. Ct. App. 2006).

There is no constitutional objection to Code 1942, § 2430 extending the jurisdiction of Mississippi to embrace a prosecution for murder based on injuries inflicted without the state where the death occurs within the state, and, further, the provisions of such section, coupled with the presumption that a person was killed in the state and county where the body was found, operates to minimize the possibility of one escaping punishment for murder



because he is clever enough to conceal the place where the victim was killed or died. *State v. Fabian*, 263 So. 2d 773 (Miss. 1972).

Where mortal blows were struck in one county and the deceased died in another county, the offender may be indicted in the second county. *Butler v. State*, 217 Miss. 750, 65 So. 2d 244 (1953).

In murder prosecution brought in county of victim's death, exclusion of oral evidence raising question for first time that prior prosecution had been begun in county in which blows were inflicted, held not error, since mere oral testimony unsupported by record of former prosecution was not competent. *Durr v. State*, 175 Miss. 797, 168 So. 65 (1936).

In murder prosecution, where defendant was prosecuted in county of victim's death and not county where blows were inflicted, question of jurisdiction arising from claim that prosecution had been first begun in county in which blows were inflicted held for court. *Durr v. State*, 175 Miss. 797, 168 So. 65 (1936).

Statute providing for venue in county in which death happens where mortal stroke

or cause of death occurs in another state or country and death happens in Mississippi held not unconstitutional. *Caldwell v. State*, 176 Miss. 80, 167 So. 779 (1936).

In murder prosecution, proof that deceased died in county of prosecution held sufficient proof of venue. *Jones v. State*, 154 Miss. 640, 122 So. 760 (1929).

This section [Code 1942, § 2430] is not violative of § 26, of the state constitution. *Atkinson v. State*, 132 Miss. 377, 96 So. 310 (1923), overruled on other grounds, *Simons v. State*, 568 So. 2d 1192 (Miss. 1990).

Under this section [Code 1942, § 2430] where an indictment for murder charges that the crime was committed in the county in which the indictment is preferred, evidence is admissible that the death occurred in another county if the fatal blow was struck in the county in which the indictment is found. *Coleman v. State*, 83 Miss. 290, 35 So. 937, 1 Am. Ann. Cas. 406 (1904), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

## RESEARCH REFERENCES

**ALR.** Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law § 513.

40 Am. Jur. 2d, Homicide §§ 194 et seq.  
**CJS.** 22 C.J.S., Criminal Law §§ 224, 225.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 9:9.

## § 99-11-23. Stolen property carried into state or carried from one county to another.

Where property is stolen in another state or country and brought into this state, or is stolen in one county in this state and carried into another, the offender may be indicted and tried in any county into or through which the property may have passed, or where the same may be found.

**SOURCES:** Codes, 1857, ch. 64, art. 245; 1871, § 2755; 1880, § 2995; 1892, § 1336; Laws, 1906, § 1408; Hemingway's 1917, § 1163; Laws, 1930, § 1188; Laws, 1942, § 2431.

**Cross References** — Offenses committed partly in one county and partly in another, see § 99-11-19.

## JUDICIAL DECISIONS

1. Generally.
2. Property stolen in another state.
3. Property stolen in another county.

**1. Generally.**

An indictment under this section [Code 1942, § 2431] properly avers that larceny took place in the county where accused is found possessing stolen property, if he is to be tried there. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

Every moment's possession by accused after the property was stolen amounted to a new asportation. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

**2. Property stolen in another state.**

Where property involved was stolen in Illinois, where defendant received it, venue to try defendant lay in Leflore County, since the crime of receiving stolen property was, under Code 1942, § 2431, committed in Leflore County when he brought the stolen property into that county. *Brown v. State*, 281 So. 2d 924 (Miss. 1973).

Fact that a car in which the defendant was riding was stopped by officers in Jackson County, Mississippi and money orders stolen from a post office in Louisiana were found therein gave jurisdiction to the circuit court of Jackson County under this section [Code 1942, § 2431]. *Chavers v. State*, 215 So. 2d 880 (Miss. 1968).

Where accused had allegedly stolen property in another state and transported it into Mississippi, the indictment must aver the larceny took place in the county where accused is found possessing it, if he is to be tried there. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

In a prosecution for larceny of property in another state and brought into Mississippi, conviction was supported on evidence that accused was in the apartment where the property was located at time the owner left for work, and when the owner returned neither accused nor property was there, possession of the property by accused two days later hundreds of miles away, together with accused's explanation of the admitted taking of the property, which explanation was neither rea-

sonable nor credible. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

One stealing hogs in another state, and after butchering them there bringing meat into this state, may be indicted here for larceny of meat. *Rainwater v. State*, 155 Miss. 684, 124 So. 801 (1929).

Every moment's continuance of the original trespass amounts to a new caption and asportation, and hence if the goods be stolen in another state and brought here, the defendant can be convicted under an indictment averring the larceny to have been committed in the county in which the indictment was found, and evidence of the acts and declarations of the accused in the other state is admissible to show the character of his possession in this state. *Watson v. State*, 36 Miss. 593 (1859).

**3. Property stolen in another county.**

Where stolen property is carried into another county without the person by whom it was stolen being in any way a party thereto, trial of such person for larceny in such county is a violation of the constitutional provisions requiring prosecution for crime to be conducted in the county where the offense was committed. *Woods v. State*, 190 Miss. 28, 198 So. 882 (1940).

Where the evidence warranted a finding that the defendant stole a cow in Carroll County and there sold it to another who sent it in to LeFlore County where it was found by its owner, defendant having no further control over or connection with the cow after its sale and having nothing to do with its being carried into LeFlore County, his trial and conviction in the latter county was erroneous. *Woods v. State*, 190 Miss. 28, 198 So. 882 (1940).

Although theft of property occurred in another county, court of county in which stolen property was discovered could exercise jurisdiction of prosecution. *Patterson v. State*, 171 Miss. 1, 156 So. 595 (1934).

Conviction in county of theft is bar to prosecution in county to which stolen property was taken. *State v. Hilton*, 144 Miss. 690, 110 So. 434 (1926).

Where property is stolen in one county and carried into another, an indictment in

the latter must aver the larceny as if it originated there. *Johnson v. State*, 47 Miss. 671 (1873); *Slaydon v. State*, 243 Miss. 644, 139 So. 2d 665 (1962).

### RESEARCH REFERENCES

**Am Jur.** 21 *Am. Jur. 2d*, Criminal Law §§ 494 et seq.      **CJS.** 22 *C.J.S.*, Criminal Law § 223.

## § 99-11-25. Aiding, encouraging or causing commission of crime within state by person while out of state.

A person who being out of this state causes, aids, advises or encourages any person to commit a crime or public offense within this state and is afterwards found within this state shall be punished in the same manner as if he had been within this state when he caused, aided, advised or encouraged the commission of such crime or public offense.

**SOURCES:** Codes, 1942, § 2431.5; Laws, 1964, ch. 335, eff from and after passage (approved June 11, 1964).

### RESEARCH REFERENCES

**Am Jur.** 21 *Am. Jur. 2d*, Criminal Law §§ 489, 490.

## § 99-11-27. Former acquittal or conviction in another jurisdiction.

Every person charged with an offense committed in another state, territory, or country may plead a former conviction or acquittal for the same offense in such other state, territory, or country; and, if such plea be established, it shall be a bar to any further proceedings for the same offense here.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 2(6); 1857, ch. 64, art. 4; 1871, § 2881; 1880, § 2997; 1892, § 1337; Laws, 1906, § 1409; *Hemingway's* 1917, § 1164; Laws, 1930, § 1189; Laws, 1942, § 2432.

**Cross References** — Constitutional provision on double jeopardy, see Miss. Const. Art. 3, § 22.

### JUDICIAL DECISIONS

1. In general.
2. Applicability.

#### 1. In general.

The statute did not apply when the prior conviction was for a federal offense. *Evans v. State*, 725 So. 2d 613 (Miss.

1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

#### 2. Applicability.

This section does not apply to federal convictions. *Campbell v. State*, 743 So. 2d 1050 (Miss. Ct. App. 1999).



## RESEARCH REFERENCES

**ALR.** Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense. 75 A.L.R.2d 683.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts-modern view. 6 A.L.R.4th 802.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 A.L.R.4th 514.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — Modern view. 97 A.L.R.5th 201.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction. 18 A.L.R. Fed. 393.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 369 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

**Lawyers' Edition.** Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions. 25 L. Ed. 2d 968.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:1.

## § 99-11-29. Acquittal for variance between indictment and proof or on exception to form.

Where a defendant is acquitted of a criminal charge upon trial on the ground of a variance between the indictment and proof, or upon exception to the form or substance of the indictment or record, he may be tried and convicted upon a subsequent indictment for the offense actually committed, notwithstanding such acquittal; and it shall be the duty of the court to order the accused into the custody of the proper officer.

In all cases of acquittal on the ground of variance between the indictment and proof, the jury, in rendering its verdict, shall so certify.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 1 (5), (6); 1857, ch. 64, arts. 5, 6; 1871, §§ 2882, 2883; 1880, §§ 2998, 2999; 1892, §§ 1338, 1339; Laws, 1906, §§ 1410, 1411; Hemingway's 1917, §§ 1165, 1166; Laws, 1930, §§ 1190, 1191; Laws, 1942, §§ 2433, 2434.

**Cross References** — Constitutional provisions on double jeopardy, see Miss. Const. Art. 3, § 22 and U.S. Const. Amend. V.

## JUDICIAL DECISIONS

### 1. In general.

In prosecution for attempted burglary of business dwelling, double jeopardy clause of United States and Mississippi Constitutions was not violated by retrial of de-

fendant following order quashing indictment due to its insufficiency and failure to charge crime, since defendant was neither acquitted nor convicted, having successfully persuaded trial court not to submit

issue of guilt or innocence to jury empaneled to try him. *City of Jackson v. Keane*, 502 So. 2d 1185 (Miss. 1987).

Where the order of the court was a nolle prosequi the defendant may be reindicted, or he may be tried upon an indictment charging him with another offense actually committed but for which he was not tried. *State v. Thornhill*, 251 Miss. 718, 171 So. 2d 308 (1965).

Where a conviction on a charge of grand larceny was reversed by the supreme court, that court, instead of rendering a final judgment, remanded the case to enable the trial judge, if he should think proper, to act upon the statutory authority given him where a defendant is acquitted on the ground of variance between the indictment and proof. *Alford v. State*, 193 Miss. 153, 8 So. 2d 508 (1942).

Where the proof in a grand larceny prosecution showed that the stolen cattle were taken in Tallahatchie County and were taken from the possession of the defendants in Coahoma County, without having passed through Grenada County,

in which the indictment alleged the offense to have been committed, the trial court should have sustained defendant's motion that venue was not proved in Grenada County; and the supreme court would render the judgment which the court below should have rendered by discharging the defendants from the present indictment, but holding them under their appearance bond to await the action of the next grand jury of the appropriate county. *Whitten v. State*, 189 Miss. 809, 199 So. 74 (1940).

Where affidavit charged petit larceny, but proof showed offense under statute respecting larceny in severing fixtures, peremptory instruction should have been granted and accused held under bond for further proceedings. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

An acquittal in a trial under an indictment charging an offense against a daughter when the proof disclosed that it was a stepdaughter, does not bar a subsequent prosecution for the offense against the stepdaughter. *Sims v. State*, 66 Miss. 33, 5 So. 525 (1889).

### RESEARCH REFERENCES

**ALR.** What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea. 63 A.L.R.2d 782.

Former jeopardy: Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prej-

udicial matter to, or making prejudicial remarks in presence of jury. 77 A.L.R.3d 1143.

**Am Jur.** 41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:1.

### § 99-11-31. Acquittal on the merits.

When a defendant is acquitted on the merits of his case, and not on any ground stated in Section 99-11-29 such acquittal shall be a bar to any subsequent accusation for the same offense, notwithstanding any defect in the record, or in the form or substance of the indictment upon which such acquittal was had.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 1(5); 1857, ch. 64, art. 6; 1871, § 2883; 1880, § 2999; 1892, § 1339; Laws, 1906, § 1411; *Hemingway's* 1917, § 1166; Laws, 1930, § 1191; Laws, 1942, § 2434.

**Cross References** — Constitutional provisions on double jeopardy, see Miss Const Art. 3, § 22, and U.S. Const., Amend. V.

## JUDICIAL DECISIONS

1. In general.
2. Former jeopardy.
3. Acquittal as precluding trial of different charge predicated on same act, or act done at same time.
4. Violation of statute and ordinance by same act.
5. Miscellaneous.

**1. In general.**

Where the defendant has been acquitted upon the merits of his case by reason of a directed verdict, such acquittal is a bar to any future accusation for the same offense, and an appeal does not subject the defendant to further prosecution. *State v. Thornhill*, 251 Miss. 718, 171 So. 2d 308 (1965).

Defense of former acquittal or conviction must be pleaded by the defendant before evidence thereof will be admitted. *Tanner v. State*, 196 Miss. 822, 18 So. 2d 300 (1944).

A collusive acquittal will not bar a subsequent prosecution. *Price v. State*, 104 Miss. 288, 61 So. 314 (1913).

An indictment dismissed by a nolle prosequi is not a bar to another indictment for the same crime. *State v. Kennedy*, 96 Miss. 624, 50 So. 978 (1910).

A conviction or acquittal on any charge without an affidavit or indictment charging the offense is no bar to subsequent prosecution for the same offense. *Woodson v. State*, 94 Miss. 370, 48 So. 295 (1909).

The offenses must be identical. *Smith v. State*, 67 Miss. 116, 7 So. 208 (1890).

An acquittal or conviction in a court without jurisdiction is not a bar to a subsequent prosecution. *Montross v. State*, 61 Miss. 429 (1883).

A conviction or acquittal without an affidavit or charge is no bar to subsequent prosecution. *Bigham v. State*, 59 Miss. 529 (1882); *Wilcox v. Williamson*, 61 Miss. 310 (1883).

A conviction or acquittal on an invalid indictment is no bar to a second prosecution. *Hurt v. State*, 25 Miss. 378 (1852); *Kohlheimer v. State*, 39 Miss. 548 (1860).

**2. Former jeopardy.**

One acquitted of violating Code 1942, § 1198, the general statute penalizing

adultery and fornication, is not twice in jeopardy by being charged under Code 1942, § 2000. *Ratcliff v. State*, 234 Miss. 724, 107 So. 2d 728 (1958).

An instance where a plea of former jeopardy is held good on a charge of unlawfully selling liquors. *King v. State*, 99 Miss. 23, 54 So. 657 (1910); *Williams v. State*, 102 Miss. 274, 59 So. 87 (1912).

An instance where a plea of former jeopardy is held good on a charge of unlawfully selling liquors. *King v. State*, 99 Miss. 23, 54 So. 657 (1910); *Williams v. State*, 102 Miss. 274, 59 So. 87 (1912).

Under the section [Code 1942, § 2434] a prisoner is not entitled to a discharge because after the introduction of evidence one of the jurors was reminded that he had been upon the grand jury which found the indictment, and, making the fact known, was discharged by the court. *Roberts v. State*, 72 Miss. 728, 18 So. 481 (1895).

**3. Acquittal as precluding trial of different charge predicated on same act, or act done at same time.**

Failure of defendant in robbery prosecution to plead former acquittal barred introduction of evidence that he formerly had been acquitted of assault and battery with intent to kill and murder, and that the indictment in the present case was based on the same evidence as that in the former case. *Tanner v. State*, 196 Miss. 822, 18 So. 2d 300 (1944).

Where proof was sufficient to support conviction for robbery, conviction of grand larceny would bar future prosecution for robbery based on same facts. *Dixon v. State*, 169 Miss. 876, 154 So. 290 (1934).

Failure to support one's family is a different offense from that of abandonment of wife and child. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

A prosecution for converting funds in the hands of an officer is barred by a former conviction of the officer under a charge of failure to account for said money. *McInnis v. State*, 97 Miss. 280, 52 So. 634 (1910).

"Balance of Account" in an indictment for embezzlement is a bar to a prosecution



for embezzling a particular item of the account, where the accused had been acquitted under the first prosecution. *State v. Caston*, 96 Miss. 183, 50 So. 569 (1909).

An acquittal on a charge of selling liquor does not bar a prosecution for conspiring at a sale founded on the same facts. *Carroll v. State*, 80 Miss. 349, 31 So. 742 (1902).

An acquittal under an indictment for assault and battery with intent to kill and murder does not bar a prosecution predicated on the same acts under a charge of aiming and discharging firearms at another. *Richardson v. State*, 79 Miss. 289, 30 So. 650 (1901).

A conviction on a charge of drunkenness does not bar a prosecution for disturbing public worship at the same time and place, where the disturbance was by other means than drunkenness. *Smith v. State*, 67 Miss. 116, 7 So. 208 (1890); *Ball v. State*, 67 Miss. 358, 7 So. 353 (1889).

A conviction or acquittal upon an indictment for assault and battery with intent to kill bars a subsequent prosecution for assault and battery and simple assault. *Jones v. State*, 66 Miss. 380, 6 So. 231 (1889).

An acquittal under an indictment for murder which does not charge an assault and battery is not good in bar of a subsequent prosecution for the latter offense. *Moore v. State*, 59 Miss. 25 (1881).

If a person engaged in a difficulty with two opponents unlawfully strikes each of them, he is subject to conviction for each assault, and a conviction for one will not bar a conviction for the other. *Teat v. State*, 53 Miss. 439 (1876); *Jones v. State*, 66 Miss. 380, 6 So. 231 (1889).

Reversal of a conviction for manslaughter and acquittal of murder on indictment for murder does not prevent another trial on the same indictment for manslaughter. *Rolls v. State*, 52 Miss. 391 (1876); *Powers v. State*, 83 Miss. 691, 36 So. 6 (1904).

#### 4. Violation of statute and ordinance by same act.

The legislature can constitutionally confer on municipalities the power by or-

dinance to punish as an offense against the municipality an act which constitutes a crime against the state. *Town of Ocean Springs v. Green*, 77 Miss. 472, 27 So. 743 (1900).

A conviction of an offense under a municipal ordinance is not a bar to a prosecution by the state for same act. *Johnson v. State*, 59 Miss. 543 (1882).

#### 5. Miscellaneous.

A defendant's conviction and sentence on a charge of rape did not subject him to double jeopardy even though he had also been convicted and sentenced on a burglary charge which arose out of the same facts and circumstances as the rape charge. *Norman v. State*, 543 So. 2d 1163 (Miss. 1989).

A conviction by a court held on Sunday will bar a subsequent prosecution. *Cherry v. State*, 103 Miss. 225, 60 So. 138 (1912).

A conviction of the accused before a justice of the peace will bar an action in the circuit court under indictment for the same offense. *Smith v. State*, 101 Miss. 853, 58 So. 539 (1912).

A failure of a court to pronounce a proper sentence will not prevent a bar to a second prosecution for the same offense. *Smithey v. State*, 93 Miss. 257, 46 So. 410 (1908).

An affidavit charging under a city ordinance against leaking water pipes where there has been an acquittal in another prosecution for the same offense is barred. *Crumpler v. City of Vicksburg*, 89 Miss. 214, 42 So. 673, 10 Am. Ann. Cas. 1098 (1907).

It is not violative of the section [Code 1942, § 2434] for the court, upon a conviction of an offender, to suspend the sentence except as to costs, and at a future term to impose a fine, etc. *Gibson v. State*, 68 Miss. 241, 8 So. 329 (1890).

On a charge of gaming a conviction for the particular offense charged in an indictment does not confer immunity as to similar offenses committed prior to the time laid in the indictment, unless evidence thereof was adduced in the trial. *Pope v. State*, 63 Miss. 53 (1885).

## RESEARCH REFERENCES

**ALR.** Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 A.L.R.2d 1141.

Conviction from which appeal is pending as bar to another prosecution for same offense. 61 A.L.R.2d 1224.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea. 63 A.L.R.2d 782.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 A.L.R.3d 834.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 A.L.R.4th 934.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 319 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:1.

## § 99-11-33. Acquittal or conviction by justice of the peace for misdemeanor not to bar prosecution for felony.

The acquittal or conviction of a person by a justice of the peace, or a county court on a charge of being guilty of a misdemeanor, shall not be a bar to a prosecution for a felony in the same matter; but thereafter, on indictment for the felony, if the accused be acquitted thereof, he shall not be convicted of the constituent misdemeanor; and, if convicted of the felony, the court may moderate the sentence so as not to punish for the constituent misdemeanor.

**SOURCES:** Codes, 1880, § 3000; 1892, § 1340; Laws, 1906, § 1412; Hemingway's 1917, § 1167; Laws, 1930, § 1192; Laws, 1942, § 2435; Laws, 1928, ch. 43.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Constitutional provisions on double jeopardy, see Miss. Const. Art. 3, § 22 and U.S. Const. Amend. V.

Justices of peace in misdemeanor cases upon discovering crime to be felony being required to transfer case to circuit court, see § 99-33-13.

## JUDICIAL DECISIONS

### 1. In general.

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trial in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss.

1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

Where a justice of the peace impaneled a jury to try a case and afterwards discharged it and continued the case without a charge on merits held not to constitute former jeopardy. *Chandler v. State*, 140 Miss. 524, 106 So. 265 (1925).

The statute is not violative of Const. 1890, § 22, declaring that no one shall be twice placed in jeopardy for the same

offense. *Huffman v. State*, 84 Miss. 479, 36 So. 395 (1904).

An acquittal of assault and battery before a justice bars a subsequent conviction

of assault and battery on an indictment for assault with intent to murder. *Rucker v. State*, 24 So. 311 (Miss. 1898).

## RESEARCH REFERENCES

**ALR.** Conviction of lesser offense as bar to prosecution for greater on new trial. 61 A.L.R.2d 1141.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 351 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:1.

## § 99-11-35. No acquittal for defects of form.

A person shall not be acquitted or discharged in a criminal case, before verdict, for any irregularity or informality in the pleadings or proceedings; nor shall any verdict or judgment be arrested, reversed or annulled after the same is rendered, for any defect or omission in any jury, either grand or petit, or for any other defect of form which might have been taken advantage of before verdict, and which shall not have been so taken advantage of.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 2(65); 1857, ch. 64, art. 7; 1871, § 2884; 1880, § 3001; 1892, § 1341; Laws, 1906, § 1413; Hemingway's 1917, § 1168; Laws, 1930, § 1193; Laws, 1942, § 2436.

**Cross References** — Formal or technical words not necessary in an indictment, see § 99-7-3.

Acquittal for variance between indictment and proof or on exception to form, see § 99-11-29.

## JUDICIAL DECISIONS

1. In general.
2. Failure to swear jury.
3. Defects in, or pertaining to, indictment or affidavit.

### 1. In general.

The statute is constitutional. *Ex parte Phillips*, 57 Miss. 357 (1879).

### 2. Failure to swear jury.

Defendants could not complain for first time on appeal that grand jury and petit jury were not sworn. *Brown v. State*, 173 Miss. 542, 158 So. 339 (1935), error overruled, 173 Miss. 542, 161 So. 465 (1935), rev'd on other grounds, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), conformed to, 167 So. 82 (Miss. 1936).

Murder conviction would not be reversed on ground that grand jury and petit jury were not sworn, where fact did

not affirmatively appear. *Brown v. State*, 173 Miss. 542, 158 So. 339 (1935), error overruled, 173 Miss. 542, 161 So. 465 (1935), rev'd on other grounds, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), conformed to, 167 So. 82 (Miss. 1936).

The failure of the court to specially swear a jury in a capital case where there is no objection raised before verdict cannot be taken advantage of for the first time on motion for a new trial. *Hill v. State*, 112 Miss. 375, 73 So. 66 (1916).

The defect in the failure to seasonably swear all of the grand jurors, who were afterwards sworn, cannot be taken advantage of for the first time after verdict. *Boroum v. State*, 105 Miss. 887, 63 So. 297 (1913), error overruled, 105 Miss. 893, 63 So. 457 (1913).

A plea of "not guilty" before filing a



motion to quash an indictment does not waive the right to object that the grand jury was not sworn, and to permit such a motion is discretionary with the court. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

Where the minutes of the court do not show that the grand jury was sworn, an indictment by such grand jury will be held void. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

Under this section [Code 1942, § 2436] an objection that the grand jury was not sworn will be presumed not well taken in the absence of a record to the contrary, when the point is raised for the first time on a motion to arrest judgment. *Hays v. State*, 96 Miss. 153, 50 So. 557 (1909).

### 3. Defects in, or pertaining to, indictment or affidavit.

Where the appellant failed to plead that his surname was not shown in the indictment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the trial court was not required to amend the indictment on its own motion. *Anselmo v. State*, 312 So. 2d 712 (Miss. 1975).

The right to receive a copy of the indictment pursuant to Code 1942 § 2441, may be waived by the accused where no objection is raised in the trial court. *Yarbrough v. Dowell Div. of Dow Chem. Co.*, 285 So. 2d 170 (Miss. 1973).

An indictment for burglary which stated in the body thereof that the grand jurors were taken from the County of Sunflower where in fact they were taken from the County of Humphreys was defective as to form but did not prejudice the defendant nor violate any of his constitutional rights and the defendant could not raise an objection for the first time after his conviction. *Temple v. State*, 221 Miss. 569, 73 So. 2d 174 (1954).

Objection that foreman of grand jury did not indorse name on indictment could not be raised for first time on appeal. *Pruitt v. State*, 163 Miss. 47, 139 So. 861 (1932).

Complaint that indictment was not sufficiently identified because of absence of clerk's filing indorsement could not be raised for first time on appeal. *Wooten v. State*, 155 Miss. 726, 125 So. 103 (1929).

Conviction on plea of guilty entered on amendable affidavit is good and cannot be set aside on certiorari for defective affidavit. *Bogle v. State*, 155 Miss. 612, 125 So. 99 (1929).

Defect in affidavit charging possession of liquor on information and belief cannot be raised for first time on appeal. *Stewart v. State*, 151 Miss. 649, 118 So. 626 (1928).

Claimed defect in indictment as not properly signed can be reached only on motion to quash and is not available for the first time on appeal. *Wilcher v. State*, 152 Miss. 13, 118 So. 356 (1928).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. *Wilkinson v. State*, 77 Miss. 705, 27 So. 639 (1900).

The judgment should be arrested in a felony case, notwithstanding Code 1892, §§ 1341, 1354 (Code 1942, §§ 2436, 2449), unless the indictment clearly states the nature and cause of the accusation. *Taylor v. State*, 74 Miss. 544, 21 So. 129 (1897).

If it is not demurred to, under this section [Code 1892, § 1341 (Code 1942, § 2436)] an indictment under Code 1892, § 1298 [Code 1942, § 2374] is sufficient after verdict although it does not allege that the promise was made to the woman, where it does charge that the defendant had carnal knowledge of a woman by virtue of a false or feigned promise of marriage. *Coates v. Worthy*, 72 Miss. 575, 17 So. 606, 13 So. 916 (1895).

The statute applies only to such defects in the indictment as can be waived, constitutional rights cannot be waived. *Newcomb v. State*, 37 Miss. 383 (1859).

## RESEARCH REFERENCES

**ALR.** Separation of jury in criminal case after submission of cause-modern cases. 72 A.L.R.3d 248.

**Am Jur.** 41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:1.

**§ 99-11-37. Cognizance and jurisdiction of crimes committed in particular district in Harrison County or Hinds County.**

(1) In Harrison County, a county having two (2) judicial districts, all crimes and misdemeanors shall be cognizable only in the proper court of the district in which the offense may be committed, and such court shall have jurisdiction of the same.

(2) In Hinds County, a county having two (2) judicial districts, all crimes and misdemeanors committed in Hinds County shall be cognizable in the court of either judicial district of the county, and such court shall have jurisdiction of the same. Any and all proceedings may be conducted in either judicial district.

**SOURCES:** Codes, 1942, § 2910-16; Laws, 1962, ch. 257, § 16; Laws, 1993, ch. 352, § 2, eff from and after passage (approved March 16, 1993).

**§ 99-11-39. Transmittal of records on change of venue or transfer or removal of trial in Harrison County or Hinds County.**

(1) In Harrison County, a county having two (2) judicial districts, in all criminal cases where the venue thereof shall be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, shall be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer shall be made.

(2) In Hinds County, a county having two (2) judicial districts, in all criminal cases where the venue thereof may be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, may be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer may be made.

**SOURCES:** Codes, 1942, § 2910-18; Laws, 1962, ch. 257, § 18; Laws, 1993, ch. 352, § 3, eff from and after passage (approved March 16, 1993).

## CHAPTER 13

### Insanity Proceedings

SEC.

- 99-13-1. Definition of "feeble-minded."  
99-13-3. Disposition of insane or feeble-minded offender brought before conservator of the peace.  
99-13-5. Disposition of accused when grand jury finds him to be insane or feeble-minded.  
99-13-7. Acquittal for insanity.  
99-13-9. Acquittal for feeble-mindedness.  
99-13-11. Mental examination of person charged with felony; cost.

#### § 99-13-1. Definition of "feeble-minded."

The term "feeble-minded," within the meaning of this chapter shall apply to any and all persons with such a degree of mental inferiority from birth, or from infancy or early childhood, that they are unable to care for themselves, to profit by ordinary public school instruction, to compete on equal terms with others, or to manage themselves and their affairs with ordinary prudence, and consequently constitute menaces to the happiness or safety of themselves or of other persons in the community, and require care, supervision and control either for their own protection or for the protection of others. These persons denominated feeble-minded comprise those commonly called idiots, imbeciles and morons, or high grade feeble-minded persons.

**SOURCES:** Codes, Hemingway's 1921 Supp. § 5728b; Laws, 1930, § 7269; Laws, 1942; § 6764; Laws, 1920, ch. 210; Laws, 1984, ch. 472, § 1, eff from and after July 1, 1984.

**Cross References** — Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

### JUDICIAL DECISIONS

#### 1. In general.

In the prosecution of a 14-year-old mentally retarded defendant for armed robbery, the trial court did not err in refusing to give an instruction that, if the jury found that the defendant was not responsible for his acts because of feeble-mindedness or mental retardation, they

should acquit him where there was no evidence that, at the time the defendant committed the criminal act, he did not realize and appreciate the nature and quality thereof and could not distinguish right from wrong. *May v. State*, 398 So. 2d 1331 (Miss. 1981).

### RESEARCH REFERENCES

**Am Jur.** 27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

40 Am. Jur. Proof of Facts 2d 171, De

fendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

**Law Reviews.** Smith, The insanity



plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

1989 Mississippi Supreme Court Review: Insanity. 59 Miss. L. J. 883, Winter, 1989.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:5.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Crim-

inal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and Others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

### § 99-13-3. Disposition of insane or feeble-minded offender brought before conservator of the peace.

When any prisoner, or any person charged with a crime or delinquency, shall be brought before any conservator of the peace, and in the course of the investigation it shall appear that said person was insane when the offense was committed, and still is insane, or was feeble-minded to such an extent as not to be responsible for his or her act or omission at the time when the act or omission charged was made, he shall not be discharged, but the conservator of the peace shall remand the prisoner to custody, and forthwith report the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with the case according to the law provided for persons of unsound mind or feeble-minded persons.

**SOURCES:** Codes, 1880, § 3139; 1892, § 1466; Laws, 1906, § 1538; Hemingway's 1917, § 1300; Hemingway's 1921 Supp, § 5728x; Laws, 1930, §§ 1325, 7287; Laws, 1942, §§ 2573, 6777; Laws, 1920, ch. 210.

**Cross References** — Conservators of the peace generally, see §§ 99-15-1 through 99-15-11.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

## JUDICIAL DECISIONS

### I. UNDER CURRENT LAW.

1. In general.
2. Decisions under earlier statutes.
- 3-10. [Reserved for future use.]

### II. UNDER FORMER LAW.

11. In general.

### I. UNDER CURRENT LAW.

#### 1. In general.

The test of a defendant's sanity is whether he had sufficient mental capacity

at time of commission of homicide to distinguish right and wrong, regardless of whether defendant was partially insane. *Hamburg v. State*, 203 Miss. 565, 35 So. 2d 324 (1948).

While a defendant charged with crime has right to orally suggest, as by motion, to the court that he may be insane, such motion or suggestion must be accompanied by affidavits or the offer of witnesses to prove insanity or inability to plead or conduct rational defense. *Skinner v. State*, 198 Miss. 505, 23 So. 2d 501 (1945), over-

ruled on other grounds, *Speagle v. State*, 390 So. 2d 990 (Miss. 1980).

While instruction, in murder prosecution wherein defendant invoked defense of mental responsibility, that peculiarities of conduct on occasions do not amount to proof of insanity, should not be given, the granting of such instruction was not reversible error where there was no evidence that the accused, when he committed the act, did not have the ability to realize and appreciate the nature and quality thereof, and to distinguish right from wrong, and where the court gave a further instruction that the jury should take into consideration the responsibility of the defendant for the crime charged against him in determining the degree of punishment to be inflicted. *Wood v. State*, 197 Miss. 657, 20 So. 2d 661 (1945), cert. denied, 325 U.S. 833, 65 S. Ct. 1087, 89 L. Ed. 1961 (1945).

Under this section [Code 1942, § 2573] and the two next following [Code 1942, §§ 2574, 2575], the defendant acquitted of murder because of insanity and put in the lunatic asylum cannot be discharged because of lucid intervals. *Caffey v. State*, 78 Miss. 645, 29 So. 396 (1901).

## 2. Decisions under earlier statutes.

Where defendant was indicted for murder, circuit court properly overruled motion to send case to chancery court to determine defendant's insanity. *Davis v. State*, 151 Miss. 883, 119 So. 805 (1929).

Where the defense is insanity in a prosecution for murder, information obtained from defendant by officers immediately following arrest was admissible. *Wallace v. State*, 143 Miss. 438, 108 So. 810 (1926).

An instruction with reference to defendant's ability of knowing right from wrong should be confined to the time of the alleged crime. *Nelson v. State*, 129 Miss. 288, 92 So. 66 (1922).

A man insane at the time for arraignment should not be arraigned. *Howie v. State*, 121 Miss. 197, 83 So. 158, 10 A.L.R. 205 (1919), overruled on other grounds, *Mitchell v. State*, 179 Miss. 814, 176 So. 743 (1937).

Where the accused convicted of a capital offense becomes insane at the time of trial and before judgment, judgment should not be pronounced against him. *Howie v. State*, 121 Miss. 197, 83 So. 158, 10 A.L.R. 205 (1919), overruled on other grounds, *Mitchell v. State*, 179 Miss. 814, 176 So. 743 (1937).

## 3.-10. [Reserved for future use.]

## II. UNDER FORMER LAW.

### 11. In general.

Where a person has been indicted for murder, after his commitment at the hospital because adjudged a lunatic, a sheriff cannot recover his custody by warrant on such indictment. *Mabry v. Hoye*, 124 Miss. 144, 87 So. 4 (1921).

## RESEARCH REFERENCES

**ALR.** Modern status of test of criminal responsibility—State cases. 9 A.L.R.4th 526.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"—modern state cases. 33 A.L.R.4th 1062.

Modern status of test of criminal responsibility—federal cases. 56 A.L.R. Fed. 326.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 34, 37 et seq., 47 et seq.

4 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

**CJS.** 22 C.J.S., Criminal Law §§ 66 et seq.

**Law Reviews.** Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring 1990.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:5.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

### § 99-13-5. Disposition of accused when grand jury finds him to be insane or feeble-minded.

When any person is held in prison, or on bail, charged with an offense, and the grand jury shall not find a true bill for reason of insanity of the accused, or for reason of feeble-mindedness of the accused, which they judge to be such that he or she was not responsible for his acts or omissions at the time when the act or omission charged was committed or made, the grand jury shall certify the fact to the circuit court, and shall state whether or not such insane or feeble-minded person is a danger to the security of persons and property, and the peace and safety of the community, and if the grand jury report such insanity or feeble-mindedness, and such danger, the court shall forthwith give notice of the case to the chancellor, or to the clerk of the chancery court, whose duty it shall be to proceed with such insane person and his estate, or such feeble-minded person, according to the law provided in the case of persons of unsound mind or feeble-minded persons.

**SOURCES:** Codes, 1871, § 2878; 1880, § 3140; 1892, § 1467; Laws, 1906, § 1539; Hemingway's 1917, § 1301; Hemingway's 1921 Supp, § 5728x; Laws, 1930, §§ 1326, 7287; Laws, 1942, §§ 2574, 6777; Laws, 1920, ch. 210.

**Cross References** — Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Effect of insanity on motion under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-23, 99-39-27.

## JUDICIAL DECISIONS

### 1. In general.

The grand jury is not required by this section to delay acting on any case to

await the outcome of the mental examination of an accused. *Williamson v. State*, 330 So. 2d 272 (Miss. 1976).

## RESEARCH REFERENCES

**ALR.** Modern status of test of criminal responsibility—States cases. 45 A.L.R.2d 1447.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense. 1 A.L.R.4th 884.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded"—modern cases. 23 A.L.R.4th 493.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"—modern state cases. 33 A.L.R.4th 1062.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 34, 37 et seq., 47 et seq.

40 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

**CJS.** 22 C.J.S., Criminal Law §§ 66 et seq.

**Law Reviews.** Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

1989 Mississippi Supreme Court Review: Insanity. 59 Miss. L. J. 883, Winter, 1989.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:5.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).



## § 99-13-7. Acquittal for insanity.

When any person shall be indicted for an offense and acquitted on the ground of insanity the jury rendering the verdict shall state therein such ground and whether the accused has since been restored to his reason, and whether he is dangerous to the community. And if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane.

**SOURCES:** Codes 1930, §§ 1327, 1328; Laws, 1942, § 2575; Laws, 1932, ch. 237.

**Editor's Note** — At the direction of the co-counsel for the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, the following corrections were made to this section: in the first sentence, "accused has since been" was substituted for "accused have since been" and "whether he is dangerous" was substituted for "whether he be dangerous."

**Cross References** — Commitment proceedings generally, see § 41-21-63.

Requirements for outpatient commitments, see § 41-21-74.

Acquittal for feeble-mindedness, see § 99-13-9.

Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

## JUDICIAL DECISIONS

### I. UNDER CURRENT LAW.

1. In general.
- 2-10. [Reserved for future use.]

### II. UNDER FORMER LAW.

11. In general.

### I. UNDER CURRENT LAW.

#### 1. In general.

Jury's verdict was not supported by substantial evidence where the State failed to present sufficient evidence, or any evidence at all, to prove defendant's sanity beyond a reasonable doubt; once the accused had overcome the presumption of sanity, it then became the State's burden to present sufficient evidence to prove the accused's sanity beyond a reasonable doubt, and the testimony of three physicians created a reasonable doubt as to defendant's sanity at the time of the accident. *Hawthorne v. State*, 881 So. 2d 234 (Miss. Ct. App. 2003).

There are 2 exclusive methods available to courts for committing an individual indefinitely to a state hospital, due to

mental disorders. The first method of commitment requires acquittal by a jury on the basis of insanity or feeble-mindedness; § 99-13-7 deals with acquittal of a crime by reason of insanity, and § 99-13-9 provides for acquittal for feeble-mindedness. The second method of indefinite commitment requires a hearing before a chancellor prior to the individual being ordered to the state hospital for treatment and is found in §§ 41-21-61 through 41-21-107. The legislature has not seen fit to bestow upon circuit judges the power to indefinitely commit an individual without the concurrence of a jury or without deferring to the chancellor through §§ 41-21-61 to 41-21-107 and, therefore, commitment of an individual to a state hospital requires more than a mere order by a circuit court judge. *Hendrix v. Gammage*, 556 So. 2d 354 (Miss. 1990).

A finding that one is mentally ill does not necessarily mean that one is M'Naghten insane. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

A defendant is presumed sane until a reasonable doubt of his or her sanity is created. When such a doubt arises, the burden is then placed upon the State to prove, beyond a reasonable doubt, the defendant's sanity. The issue of a defendant's insanity is a determination for the jury to make, and the finding will not be reversed if it is supported by substantial evidence. In making this determination, the jury may accept or reject expert and lay testimony. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

Where testimony that accused's mental condition was such at the time of the crime as to render him incapable of distinguishing between right and wrong was clear, convincing and unequivocal, and the opposing evidence was sketchy, general, and supported only by slight circumstances, the verdict of guilt, with its implicit finding of sanity, was against the overwhelming weight of the evidence. *Saunders v. Estate of Horne*, 312 So. 2d 700 (Miss. 1975).

It is inconsistent with this provision to charge the jury in a criminal case that if they should find defendant not guilty by reason of insanity and certify his danger-

ousness to the community, it would be the court's duty to commit him to the asylum until he should regain his sanity "at which time he would go free". *Gambrell v. State*, 238 Miss. 892, 120 So. 2d 758 (1960).

Where the sole defense in a criminal prosecution is insanity, it would be error for the court merely to instruct the jury to bring in a verdict of "not guilty" should they so find the defendant. *State v. Goering*, 200 Miss. 585, 28 So. 2d 248 (1946).

Statutes providing insanity shall be no defense to murder indictment held violative of due-process clause. *Sinclair v. State*, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241 (1931).

## 2-10. [Reserved for future use.]

### II. UNDER FORMER LAW.

#### 11. In general.

Where indictment charging defendant with murder was, on motion of state, passed to the files, and defendant was subsequently tried under statutory proceedings for insanity, declared insane, and committed to an asylum by the chancery court, the adjudication of the chancery court did not oust the circuit court of jurisdiction to try defendant for murder. *Byrd v. State*, 179 Miss. 336, 175 So. 190 (1937).

### ATTORNEY GENERAL OPINIONS

There is no procedure established in Mississippi Code for release of such acquitees upon recovery of sanity; circuit court committing person to mental institution pursuant to Section 99-13-7 of Code retains jurisdiction to authorize release of such person; this may be done by motion of hospital or by committed person; re-

lease of patient may be subject to any conditions that are therapeutic in nature, such as continued medication or periodic psychiatric reviews; release may not be conditioned upon patient's meeting punitive restrictions such as are normally placed on paroled convicts. *Hendrix Sept. 22, 1993*, A.G. Op. #93-0543.

### RESEARCH REFERENCES

**ALR.** Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction. 29 A.L.R.2d 703.

Requirement of unanimity of verdict in proceedings to determine sanity of one accused of crime. 42 A.L.R.2d 1468.

Modern status of test of criminal responsibility—State cases. 45 A.L.R.2d 1447.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental

condition at time of acquittal. 50 A.L.R.3d 144.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense. 1 A.L.R.4th 884.

Validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity. 2 A.L.R.4th 934.

Modern status of test of criminal responsibility—state cases. 9 A.L.R.4th 526.

“Guilty but mentally ill” statutes: validity and construction. 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

Commitment for examination under 18 USCS sec. 4247(b) of defendant giving notice of intention to raise insanity defense to criminal charge. 90 A.L.R. Fed. 902.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 79 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 224, (judgment or decree committing defendant as insane).

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 225, (warrant for commitment of defendant as insane).

40 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

**CJS.** 22 C.J.S., Criminal Law §§ 66 et seq.

**Law Reviews.** Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 4:5, 9:11.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

## § 99-13-9. Acquittal for feeble-mindedness.

When any person shall be indicted for an offense, and acquitted on the ground of feeble-mindedness, the jury rendering the verdict shall state therein such ground, and whether the accused constitutes a danger to life or property, and to the peace and safety of the community; and if the jury certify that such feeble-minded person is dangerous to the peace and safety of the community, or to himself, the court shall forthwith give notice of the case to the chancellor, or the clerk of the chancery court, whose duty it shall be to proceed with such person according to the law provided in the case of feeble-minded persons, the feeble-minded person himself being remanded to custody to await the action of the chancery court.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 5728x; Laws, 1930, § 7287; Laws, 1942, § 6777; Laws, 1920, ch. 210.

**Cross References** — Commitment proceedings generally, see § 41-21-63.

Requirements for outpatient commitments, see § 41-21-74.

Acquittal for insanity, see § 99-13-7.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.



## JUDICIAL DECISIONS

**1. In general.**

There are 2 exclusive methods available to courts for committing an individual indefinitely to a state hospital, due to mental disorders. The first method of commitment requires acquittal by a jury on the basis of insanity or feeble-mindedness; § 99-13-7 deals with acquittal of a crime by reason of insanity, and this section provides for acquittal for feeble-mindedness. The second method of indefinite commitment requires a hearing before a chancellor prior to the individual being ordered to the state hospital for treatment and is found in §§ 41-21-61 through 41-21-107. The legislature has not seen fit to bestow upon circuit judges the power to indefinitely commit an individual without the concurrence of a jury or without deferring to the chancellor

through §§ 41-21-61 to 41-21-107 and, therefore, commitment of an individual to a state hospital requires more than a mere order by a circuit court judge. *Hendrix v. Gammage*, 556 So. 2d 354 (Miss. 1990).

In the prosecution of a 14-year-old mentally retarded defendant for armed robbery, the trial court did not err in refusing to give an instruction that, if the jury found that the defendant was not responsible for his acts because of feeble-mindedness or mental retardation, they should acquit him where there was no evidence that, at the time the defendant committed the criminal act, he did not realize and appreciate the nature and quality thereof and could not distinguish right from wrong. *May v. State*, 398 So. 2d 1331 (Miss. 1981).

## RESEARCH REFERENCES

**ALR.** "Guilty but mentally ill" statutes: validity and construction. 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 34, 37 et seq., 47 et seq.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

**CJS.** 22 C.J.S., Criminal Law §§ 66 et seq.

**Law Reviews.** Smith, The insanity plea in Mississippi: a primer and a proposal 10 Miss. C. L. Rev. 147, Spring, 1990.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 4:5.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

## § 99-13-11. Mental examination of person charged with felony; cost.

In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or on the motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist or psychologist selected by the court to determine his ability to make a defense; provided, however, any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending.

**SOURCES:** Codes, 1942, § 2575.5; Laws, 1960, ch. 262; Laws, 1997, ch. 474, § 1; Laws, 1997, ch. 433, § 1, eff from and after July 1, 1997.

**Joint Legislative Committee Note** — Section 1 of ch. 474, Laws of 1997, effective from and after passage (approved March 27, 1997) amended this section. Section 1 of ch. 433, Laws of 1997, also amended this section, effective July 1, 1997. As set out above, this section reflects the language of Section 1 of ch. 433, Laws of 1997, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section taking effect earlier.

**Cross References** — Commitment proceedings generally, see § 41-21-63.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Competency determination, see Miss. Unif. Cir. & County Ct. Prac. R. 9.06.

Insanity defense and mental examinations, see Miss. Unif. Cir. & County Ct. Prac. R. 9.07.

## JUDICIAL DECISIONS

1. Generally.
2. Grounds for appointment of examiner.
3. Defendant's right to select examiner.
4. Conduct of examination.
5. Consideration of examination results.
6. Appealability.
7. Miscellaneous.

### 1. Generally.

In hearing to determine whether or not accused is competent to stand trial, state need not be required to prove competency beyond reasonable doubt or by clear and convincing evidence, where procedures such as those set forth in *Emanuel v. State*, 412 So. 2d 1187 (Miss. 1982), have been approved by United States Supreme Court (see *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)), prosecution at federal level is required to prove competency of criminal defendant by preponderance of evidence, and due process afforded defendant by current procedures preclude need to impose greater burden on state officials. *Griffin v. State*, 504 So. 2d 186 (Miss. 1987).

In hearing to determine defendant's competency to stand trial, evidence must demonstrate probability rather than mere possibility that defendant is incapable of making rational defense, and trial court's decision that evidence does not show such probability will not be overturned unless it can be said that finding was manifestly against overwhelming weight of evidence. *Emanuel v. State*, 412 So. 2d 1187 (Miss. 1982).

In a prosecution for murder, the trial court did not abuse its discretion in refusing to order a further mental study of the defendant where the defendant had previously been examined on several occasions to establish his mental condition and no further evidence was offered to support the request for a further examination. *Parcell v. State*, 389 So. 2d 1386 (Miss. 1980).

Psychiatrist's examination of defendant was inadequate where the psychiatrist himself testified that further examination of the defendant was needed and where his examination of defendant had consisted merely of a one hour and 15 minute interview. *Hill v. State*, 339 So. 2d 1382 (Miss. 1976), cert. denied, 430 U.S. 987, 97 S. Ct. 1689, 52 L. Ed. 2d 384 (1977).

This section [Code 1942, § 2575.5] does not alter preexisting law, its purpose being merely to authorize the circuit judge to appoint a psychiatrist and to pay for the expense of the examination from county funds. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

The discretion of a judge acting under this provision is a judicial one, requiring some evidential laws. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

Apart from the statutes, the general law permits a court to call expert witnesses for the purpose of examining prisoners and testifying therefrom. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

The statute leaves unchanged the requirement that an accused not capable of conducting his defense in a rational man-

ner may not be brought to trial, and merely supplements the former rule requiring the trial judge to empanel a jury to try the issue of competency preliminarily to trial on the merits. *McGinnis v. State*, 241 Miss. 883, 133 So. 2d 399 (1961).

The purpose of this statute is to avoid placing an accused on trial unless he is at the time capable of conducting a rational defense by intelligently conferring with his counsel. *McGinnis v. State*, 241 Miss. 883, 133 So. 2d 399 (1961); *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342 (1964); *Tarrant v. State*, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823 (1971).

## 2. Grounds for appointment of examiner.

Defendant's conviction for attempted kidnapping was proper where he failed to present sufficient evidence to support his claim that a mental examination was required. The simple fact that defendant was seeing a psychiatrist did not require that the trial court find that he was incapable of a rational defense or order a mental examination. *Carter v. State*, 932 So. 2d 850 (Miss. Ct. App. 2006).

The trial court justly concluded that a mental examination was unnecessary in order to conduct a fair trial, notwithstanding the defendant's assertion that he suffered from periodic loss of memory and occasional blackouts, where the record indicated that the trial judge directed a series of questions to the defense to ensure that the defendant was capable to stand trial, and that, after addressing these questions, the judge concluded that the circumstance indicated that the defendant was fully competent to stand trial. *Benish v. State*, 733 So. 2d 855 (Miss. Ct. App. 1999).

A trial court did not err in not ordering a competency hearing for a capital murder defendant, in spite of evidence that the defendant took medication for schizophrenia, made a suicide "gesture," and allegedly "heard voices," where there was nothing in the record which, considered in context, led "inexorably to the conclusion that [the defendant] could neither understand the proceedings or appreciate their significance, nor rationally aid his attor-

ney in his defense." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A defendant had no right to funds to employ his own psychiatrist where the trial court had granted him a mental examination at a state hospital. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

Denial of a request for further mental examination to determine competency to stand trial was not error where a previous mental examination conducted a month prior to trial had resulted in the determination that the defendant was competent to stand trial. *Wheeler v. State*, 536 So. 2d 1347 (Miss. 1988).

Trial court should select and appoint competent psychiatrist to determine defendant's ability to make defense when defendant appears to be incompetent. *Gammage v. State*, 510 So. 2d 802 (Miss. 1987).

The trial court did not abuse its discretion in overruling a motion for a psychiatric examination of a defendant charged with armed robbery where a deputy sheriff testified that during the year that defendant had been in jail he had always appeared normal and rational and had served as a trusty for about three months and where a defense witness admitted that defendant had never been treated for a mental condition or psychiatrically examined. *Harris v. State*, 386 So. 2d 393 (Miss. 1980).

The trial court did not err in denying a psychiatric examination to the defendant in a murder prosecution where the only evidence offered in support of the petition was defendant's own conflicting testi-



mony. *Bell v. State*, 360 So. 2d 1206 (Miss. 1978), cert. denied, 440 U.S. 950, 99 S. Ct. 1433, 59 L. Ed. 2d 640 (1979).

It was error to deny defendant's motion for his commitment and determination of his sanity where three witnesses had testified as to his unusual behavior and had given their opinions that he was not sane, and a fourth witness, a psychiatrist, had testified, based on a limited examination, that defendant was incapable of making a rational defense and that he needed further examination. *Stevenson v. State*, 325 So. 2d 113 (Miss. 1975), overruled on other grounds, *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976).

If a person charged with a felony would have a psychiatrist furnished for the purpose of examining his ability to assist in his defense, he must present evidence of the probability that he is unable to assist in his own defense, and the trial judge has reasonable discretion in determining whether such accused should be examined by a psychiatrist. *McLeod v. State*, 229 So. 2d 557 (Miss. 1969).

In order to obtain the services of a psychiatrist under the section [Code 1942, § 2575.5] some evidence must be introduced or some fact acquired from observation of the court, to indicate the necessity of psychiatric aid, and where the only reason given in support of a motion that a psychiatrist be appointed to examine a defendant charged with rape was that "the very nature of the case called for the aid of a psychiatrist", and there was nothing in the record to indicate any mental deficiency of the defendant, the motion was properly overruled. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

This section [Code 1942, § 2575.5] was intended to cover the mental condition of persons charged with crime, and where the affidavits supporting the defendant's motion for a psychiatric examination failed to allege insanity but only charged that defendant was a chronic alcoholic, the trial judge properly overruled the motion. *King v. State*, 210 So. 2d 887 (Miss. 1968).

The lower court did not abuse its discretion in overruling accused's motion for examination as to his mental ability to stand trial where, although afforded op-

portunity to do so, he failed, on a hearing upon the motion, to produce evidence to the effect that there was a reasonable probability that he was incapable of making a rational defense. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342 (1964).

To warrant an order under this section [Code 1942, § 2575.5], there must be a reasonable probability that accused is not physically and mentally able to confer with his counsel as to the merits of his case and to testify as a witness in his own behalf. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

Before an accused may be subjected to a psychiatric examination before trial, there must be evidence raising a reasonable doubt of insufficient unsoundness of mind to make a rational defense. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

### 3. Defendant's right to select examiner.

A defendant was not improperly denied the assistance of an independent privately employed psychiatrist in violation of his Sixth, Eighth and Fourteenth Amendment rights where the defendant requested and received a psychiatric examination and evaluation to determine his mental condition, resulting in the unanimous determination of 5 medical professionals that the defendant was sane at the time of the charged offense and was competent to aid in his defense. *Lanier v. State*, 533 So. 2d 473 (Miss. 1988).

A murder defendant was not entitled to a private psychologist at the county's expense to assist the defense counsel in establishing mitigating evidence during the sentencing phase where the defendant did not raise the insanity defense at trial, did not claim to be incompetent to stand trial, the State did not produce psychiatric testimony against the defendant in the penalty phase and the defendant failed to demonstrate that his sanity at the time of the offense was to be a significant factor at trial. *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994),

cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

This section [Code 1942, § 2575.5] makes no provision for the appointment of the psychiatrist selected by the defendant. *Tarrants v. State*, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823 (1971); *King v. Cook*, 297 F. Supp. 99 (N.D. Miss. 1969).

There are no statutory provisions for the appointment and payment of a psychiatrist selected either by the court or the defendant; and defendant's motion for the appointment of a private psychiatrist to examine him was properly overruled. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

This section [Code 1942, § 2575.5] makes no provision for the appointment of a psychiatrist chosen by the defendant, and the trial court has, and should have, the right to select the psychiatrist upon whom it is to depend. *King v. State*, 210 So. 2d 887 (Miss. 1968).

#### 4. Conduct of examination.

Where a well known and recognized psychiatrist, who had been appointed by the court to examine the accused, had observed the accused during the prior sanity hearing and had heard all the witnesses testify, and had examined the accused privately for about 30 minutes, the accused's contention that the psychiatrist's examination was not conducted for a sufficient time for him to exclude all reasonable doubt as to whether the accused knew the difference between right and wrong was not well taken. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

#### 5. Consideration of examination results.

The result of an examination under this statute is for consideration by the court and jury in determining, prior to trial on the merits, the issue of present insanity. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

#### 6. Appealability.

An order made under this section [Code 1942, § 2575.5] is not appealable. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

#### 7. Miscellaneous.

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant testified under oath that he understood what he was doing and that his mind was clear, and, additionally, he did not produce any supporting affidavits to the appellate court to establish his alleged mental deficiency, as required by Miss. Code Ann. § 99-39-9(e); thus, the trial judge did not abuse her discretion in not ordering, upon her own motion, a psychiatric evaluation of defendant pursuant to Miss. Code Ann. § 99-13-11 because she determined that the accused was competent to understand the nature of the charges as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(4)(a) and defendant's motion for post-conviction relief was denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

The court did not abuse its discretion in refusing to order a mental examination to determine whether the defendant was capable of making a rational defense on his own behalf; although he asserted that he suffered from a memory loss as the result of a closed-head injury sustained in the accident at end of his flight from authorities and that he had absolutely no recollection of the events that transpired, he provided no evidence of his injury or memory loss and the matter was not even raised when the motion was presented. *Wilson v. State*, 755 So. 2d 2 (Miss. Ct. App. 1999).

Defendant was not competent to stand trial due to finding that he was unable to assist in his defense, where defendant's intelligence quotient was 48 to 52, findings of psychologist concluded that defendant did not possess mental capacity to assist in preparation of defense, and district attorney's motion to pass case to files contained affidavit asking that defendant be committed to mental institution; state's only effort at rebutting evidence of incompetency was effort to prove that defendant had answered questions rationally at his arraignment. *Gammage v. State*, 510 So. 2d 802 (Miss. 1987).

At a hearing on a habeas corpus petition asserting that the sentencing court erred in failing to have a pretrial jury resolve the mental competency of defendant to



stand trial, under this section, evidence of psychiatric reports, defendant's testimony at the sentencing hearing, and defendant's attorney's testimony, was sufficient to support findings that defendant knew right from wrong, that he was able to aid his counsel, that he had average or better intelligence, and that he was without psychosis; and thus, there was no reason for the sentencing judge to hold, on his own initiative, any separate hearing as to defendant's competency. *Caylor v. State*, 437 So. 2d 444 (Miss. 1983), cert. denied, 465 U.S. 1032, 104 S. Ct. 1300, 79 L. Ed. 2d 700 (1984), reh'g denied, 466 U.S. 946, 104 S. Ct. 1934, 80 L. Ed. 2d 478 (1984).

In an appeal from a felony conviction, where the appellant filed a motion requesting that his appeal be dismissed and

purporting to discharge his attorneys, and counsel of record responded to the request by raising the question whether the appellant was mentally competent to represent himself, the question of his competency was to be determined before passing on the motion, the supreme court would order that the trial court conduct a factual hearing after a mental examination, on the question whether the appellant was competent to represent himself in the case and to know and understand the effect of his motion to dismiss the appeal. *Tarrants v. State*, 231 So. 2d 493 (Miss. 1970).

Habeas corpus is available to an accused to test the validity of an order under this section [Code 1942, § 2575.5]. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

### ATTORNEY GENERAL OPINIONS

Expenses incurred in mental examination of defendant in criminal action should be borne by county in which action is

pending. *Hendrix*, June 4, 1991, A.G. Op. #91-0379.

### RESEARCH REFERENCES

**ALR.** Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 A.L.R.2d 434.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological or hospital reports. 55 A.L.R.3d 551.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 A.L.R.4th 910.

Modern status of test of criminal responsibility—State cases. 9 A.L.R.4th 526.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense. 17 A.L.R.4th 1274.

Qualification of nonmedical psychologist to testify as to mental condition or competency. 72 A.L.R.5th 529.

Commitment for examination under 18 USCS sec. 4247(b) of defendant giving

notice of intention to raise insanity defense to criminal charge. 90 A.L.R. Fed. 902.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 93 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 221-223, (psychiatric examination of accused).

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

**Lawyers' Edition.** Indigent criminal defendant held entitled to assistance of psychiatrist when sanity at time of offense is seriously in question. 84 L. Ed. 2d 53.

**Law Reviews.** 1989 Mississippi Supreme Court Review: Insanity. 59 Miss. L. J. 883, Winter, 1989.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 2:18, 4:5, 11:8.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).



## CHAPTER 15

### Pretrial Proceedings

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#### IN GENERAL

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## § 99-15-1. Conservators of peace; defined.

The judges of the Supreme, circuit and chancery courts and of the court of appeals are conservators of the peace throughout the state, and each judge of the county court and every justice court judge is such within his county.

**SOURCES:** Codes, 1857, ch. 64, art. 328; 1871, § 2821; 1880, § 3112; 1892, § 1460; Laws, 1906, § 1533; Hemingway's 1917, § 1295; Laws, 1930, § 1320; Laws, 1942, § 2568; Laws, 1996, ch. 385, § 1, eff from and after July 1, 1996.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

## JUDICIAL DECISIONS

### 1. In general.

No officer should make complaint before magistrate so as to charge suspect with capital or other felony until such officer has had sufficient opportunity to ascertain whether or not such complaint is reasonably justified, and committing magistrate has no jurisdiction to inquire into case until someone is willing to lodge formal charge against accused. *Moore v. State*, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

The words "any conservator of the peace" are limited to the judicial officials designated in this section [Code 1942, § 2568] and do not include a sheriff. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

The words "any conservator of the peace" in § 1321, Code of 1930 [Code 1942, § 2569], are limited to the persons designated as conservators of the peace in § 1320, Code of 1930 [Code 1942, § 2568], and does not embrace all civil officers referred to in Miss Const § 167. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

A clerk of the circuit court is without power to issue a warrant for the arrest of a person charged with crime by an affidavit lodged with him, and, accordingly, the arrest of one for a felony on a warrant issued by a circuit clerk was illegal, and the bond under which he was set at liberty is void. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

## RESEARCH REFERENCES

**Practice References.** Young, *Trial Handbook for Mississippi Lawyers* § 27:9. Cipes, Bernstein, and Hall, *Criminal Defense Techniques* (Matthew Bender).

Erickson and George, *United States Supreme Court Cases and Comments: Criminal Law and Procedure* (Matthew Bender).

Hrones, *Criminal Practice Handbook*, Third Edition (Michie).

Kadish and Others, *Criminal Law Advocacy* (Matthew Bender).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Perrin, Caldwell and Chase, *The Art and Science of Trial Advocacy* (Anderson).

Rudstein, Erlinder, and Thomas, *Criminal Constitutional Law* (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

**§ 99-15-3. Conservators of peace; power to take bonds and recognizances; forfeiture.**

Any conservator of the peace has power to take all manner of bonds and recognizances from persons charged on affidavit with crimes and offenses, for their appearance in the circuit court to answer thereto, as well as for crimes and offenses committed in their presence. If any person fail to give bond or enter into recognizance, with the sureties prescribed, when required to do so by a conservator of the peace, he shall be committed to the county jail, there to remain until he comply or be otherwise discharged by due course of law. Every bond or recognizance so taken shall be returned to the circuit court before its next term. If any person so bound fail to appear in the circuit court, his bond or recognizance shall be adjudged forfeited, and otherwise proceeded with as provided by law.

**SOURCES:** Codes, 1857, ch. 64, art. 328; 1871, § 2821; 1880, § 3112; 1892, § 1460; Laws, 1906, § 1533; Hemingway's 1917, § 1295; Laws, 1930, § 1320; Laws, 1942, § 2568.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

**JUDICIAL DECISIONS**

**1. In general.**

A deputy clerk, who was neither a judge nor a conservator of the peace, as defined by this section and § 99-15-5, was without authority to issue an arrest warrant; accordingly, the warrant issued by him was invalid. *Lanier v. State*, 450 So. 2d 69 (Miss. 1984).

An indigent defendant charged with aggravated assault and unable to make bail was improperly denied release on her own recognizance where the record was devoid of any consideration by the judicial officer of alternative forms of release and where there was no evidence that there was a substantial risk of nonappearance. On remand to consider whether a form of pretrial release other than money bail would adequately assure defendant's presence at trial, the ABA minimum standards relat-

ing to pretrial release would serve as a guide to the judicial officer in making the release decision. *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979).

A defendant charged with armed robbery should be granted bail where the proof of his guilt was not evident or the presumption thereof great on the record. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

A clerk of the circuit court is without power to issue a warrant for the arrest of a person charged with crime by an affidavit lodged with him, and, accordingly, the arrest of one for a felony on a warrant issued by a circuit clerk was illegal, and the bond under which he was set at liberty is void. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

**ATTORNEY GENERAL OPINIONS**

Justice court judge acting as conservator of peace has authority to set bond or release defendant on recognizance pending action of grand jury or circuit court but

bond or recognizance must be returned to circuit court before its next term. *Vess*, March 18, 1994, A.G. Op. #94-0124.



## RESEARCH REFERENCES

**ALR.** Bail jumping after conviction, failure to surrender or to appear for sentencing, and the like, as contempt. 34 A.L.R.2d 1100.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

### § 99-15-5. Conservators of the peace; arrest and commitment of offenders.

Any conservator of the peace may, upon a finding of probable cause, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested and brought before him, or before some other conservator of the peace in the proper county. On examination, the conservator of the peace shall commit the offender to jail if the offense be not bailable, and if it be bailable and the offender fail to find bail.

**SOURCES:** Codes, 1857, ch. 64, art. 329; 1871, § 2822; 1880, § 3113; 1892, § 1461; Laws, 1906, § 1534; Hemingway's 1917, § 1296; Laws, 1930, § 1321; Laws, 1942, § 2569; Laws, 1982, ch. 470, eff from and after passage (approved April 20, 1982).

**Cross References** — Disposition of insane or feeble-minded offender brought before conservator of the peace, see § 99-13-3.

Preliminary hearings, see Miss. Unif. Cir. & County Ct. Prac. R. 6.04.

## JUDICIAL DECISIONS

#### 1. In general.

A deputy clerk, who was neither a judge nor a conservator of the peace, as defined by § 99-15-3 and this section, was without authority to issue an arrest warrant; accordingly, the warrant issued by him was invalid. *Lanier v. State*, 450 So. 2d 69 (Miss. 1984).

The words "any conservator of the peace" are limited to the officials designated as conservators of the peace in Code

1942, § 2568, and do not include a sheriff. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

The words "any conservator of the peace" in § 1321, Code of 1930 [Code 1942, § 2569], are limited to the persons designated as conservators of the peace in § 1320, Code of 1930 [Code 1942, § 2568], and does not embrace all civil officers referred to in Miss Const § 167. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

## RESEARCH REFERENCES

**ALR.** Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

**Am Jur.** 5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 4 et seq.

### § 99-15-7. Conservators of the peace; prosecutor and witnesses may be required to give bond.

The conservator of the peace may require the prosecutor and witnesses appearing before him, in any case of examination for felony or other crime, to

enter into bond or recognizance, in such sum as he may deem proper, with or without security, as he may think the interest of justice to demand, for their appearance to prosecute or give evidence touching the offense, before him on further examination or in the circuit court; and, in default of such bond or recognizance, he may commit the defaulter to jail until he give bail or be otherwise discharged by due course of law.

**SOURCES:** Codes, 1857, ch. 64, art. 330; 1871, § 2823; 1880, § 3114; 1892, § 1462; Laws, 1906, § 1535; Hemingway's 1917, § 1297; Laws, 1930, § 1322; Laws, 1942, § 2570.

**Cross References** — Preliminary hearings, see Miss. Unif. Cir. & County Ct. Prac. R. 6.04.

### § 99-15-9. Conservators of the peace; subpoenas.

A conservator of the peace, in all examinations had before him for offenses, may issue a subpoena to any county, and compel obedience thereto.

**SOURCES:** Codes, 1857, ch. 64, art. 334; 1871, § 2827; 1880, § 3117; 1892, § 1464; Laws, 1906, § 1536; Hemingway's 1917, § 1298; Laws, 1930, § 1323; Laws, 1942, § 2571.

### § 99-15-11. Conservators of the peace; search warrant for stolen property.

Any conservator of the peace, on the affidavit of a credible person, may issue a search warrant and cause stolen or embezzled goods to be seized; but the affidavit and warrant must specify the goods to be seized and the person or place to be searched.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 1(28); 1857, ch. 64, art. 331; 1871, § 2824; 1880, § 3115; 1892, § 1469; Laws, 1906, § 1541; Hemingway's 1917, § 1303; Laws, 1930, § 1329; Laws, 1942, § 2576.

## JUDICIAL DECISIONS

### 1. In general.

The purpose of a search warrant is merely to authorize the officer to make the search, it does not charge any person with the crime of larceny of the goods, and there is no good reason to require that the affidavit and search warrant shall show the name of the owners of the property, and such a showing is neither necessary nor required by this section [Code 1942, § 2576]. *Caldwell v. State*, 194 So. 2d 878 (Miss. 1967).

An affidavit and search warrant to recover stolen goods is not invalid for failure

to state name of owner of goods. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

Justice of the peace is not required to mark an affidavit in support of a search warrant "filed" under Code 1942, § 1812, which provides that criminal cases are begun by "lodging" the affidavit with the justice of the peace. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

Failure of police officer making search for stolen articles pursuant to lawful affidavit and search warrant to make a return thereon does not invalidate search or make incompetent testimony as to articles

recovered by the search. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

## RESEARCH REFERENCES

**ALR.** Distribution of truth of matters stated in affidavit in support of search warrant—modern cases. 24 A.L.R.4th 1266.

**Lawyers' Edition.** Requirement, under Federal Constitution, that person is-

suing warrant for arrest or search be neutral and detached magistrate. 32 L. Ed. 2d 970.

**Practice References.** Young, *Trial Handbook for Mississippi Lawyers* § 27:9.

## § 99-15-13. Repealed.

Repealed by Laws, 1980, ch. 555, § 9, eff from and after July 1, 1980.

[Codes, 1930, § 1363; 1942, § 2610; Laws, 1926, ch. 165; 1964, 1st Ex Sess ch. 22, § 1]

**Editor's Note** — For provisions regarding the Mississippi Justice Information Center and maintenance and submission of records, fingerprints, photographs and other data, see §§ 45-27-1 et seq.

## § 99-15-15. Appointment of counsel for indigents.

When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the court, appoint counsel to defend him.

Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor.

The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

**SOURCES:** Codes, 1942, § 2505-01; Laws, 1971, ch. 490, § 2; reenacted without change, Laws, 1999, ch. 375, § 1; reenacted without change, Laws, 2000, ch. 332, § 1, eff from and after July 1, 2000; reenacted without change, Laws, 2001, ch. 375, § 1, eff from and after July 1, 2001.

**Editor's Note** — Laws of 1998, ch. 575, § 20, as amended by Laws of 1999, ch. 375, § 2, as amended by Laws of 2000, ch. 332, § 2, and as amended by Laws of 2001, ch. 375, § 2, which provided for the repeal of § 99-15-15, was repealed by Laws of 2002, ch. 315, § 1.

Laws, 1998, ch. 575, § 21, provides:

“SECTION 21. (1) All new programs authorized under this Senate Bill No. 2239 shall be subject to the availability of funds specifically appropriated therefor by the Legislature during the 1998 Regular Session or any subsequent session. This act shall be codified but no amendment to a code section or repeal of a code section enacted by this Senate Bill No. 2239 shall take effect until the Legislature has funded any new programs authorized hereunder by line item appropriation, said line item appropriation to be certified by the Legislative Budget Office to the Secretary of State.

“(2) Notwithstanding any other provision of this act, the only actions authorized under this act to be funded shall be the hiring of the executive director, the hiring of a



secretary for the executive director, expenses necessary for the operation of the commission and the executive director's office and expenses incidental thereto, and providing per diem for the members of the commission unless other legal funding as authorized under this act other than by appropriation of the Legislature is available. The commission shall assess the feasibility and cost of the implementation of this act and report its findings to the Legislature not later than January 1, 1999. This subsection (2) shall stand repealed on July 1, 1999."

**Cross References** — Compensation for counsel for indigents appointed as provided in this section, see § 99-15-17.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Reimbursement of country in certain cases for compensation of counsel, § 99-15-19.

Appointment of interpreters in criminal cases for defendant declared indigent, see § 99-17-7.

## JUDICIAL DECISIONS

1. Generally.
4. Benefit of effective counsel.
5. Appellate counsel.

### 1. Generally.

A trial judge's remark at the beginning of trial that defense counsel was appointed, though not particularly commendable, did not amount to reversible error. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A defendants's right to counsel had not attached at the time of a pre-indictment line up where the record did not reflect that the defendant was or reasonably ought to have been charged with a crime prior to that time. *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Refusal to grant continuance on third trial of prosecution for rape, which trial took place some two weeks after employment of new counsel for defendant, did not constitute a denial of defendant's right to effect a representation by counsel contrary to the Fourteenth Amendment of the United States Constitution, where more than two years had elapsed since the commission of the offense, such counsel

had advantage of voluminous and comprehensive briefs, records and opinions of the court in two previous trials and the assistance of two investigators to help them in preparing for the trial. *McGee v. State*, 40 So. 2d 160 (Miss. 1949), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950).

### 4. Benefit of effective counsel.

Defendant was not entitled to appointed counsel in pursuing further discretionary review following affirmance of conviction; thus, defendant could not claim ineffective assistance based on counsel's failure to inform him of affirmance in time to file timely petition for rehearing. *Harris v. State*, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

### 5. Appellate counsel.

A defendant is entitled to appointment of counsel in connection with the automatic review of a death sentence. *Jackson v. State*, 732 So. 2d 187 (Miss. 1999).

Defendant in criminal proceedings is not entitled to continued assistance of appointed defense counsel where defendant seeks certiorari. *Harris v. State*, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

Appointed counsel is not required by State Constitution, statutes, or rules at postconviction relief stages of the appellate process, even though there is a right to file such proceedings. *Harris v. State*,

704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

### ATTORNEY GENERAL OPINIONS

The court appointed attorney may be reimbursed for fees and expenses incurred in representing the defendant up to the point in time that he was prohibited from practicing law; thereafter, he would be legally unable to represent the defendant and therefore, could not charge any fee for representation. Pouncy, Dec. 18, 1991, A.G. Op. #91-0868.

Judge has discretion in setting reasonable fees for counsel appointed for indigents under this section, and may award less than \$1,000. Rogers, Jan. 8, 1993, A.G. Op. #92-0936.

If one of the public defenders has a conflict of interest in a case then another

public defender should handle the case. If a conflict exists such that no public defender may represent the defendant then the justice court judge has authority to appoint counsel as allowed under this section. Burton, June 21, 1996, A.G. Op. #96-0385.

An indigent defendant charged with a misdemeanor is entitled to legal representation by the public defender where a substantial right may be affected, e.g., when the defendant faces imprisonment for any length of time. Belk, Jr., June 30, 2000, A.G. Op. #2000-0360.

### RESEARCH REFERENCES

**Am Jur.** 8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Form 41.5, 42.

46 Am. Jur. Trials 571, Strategies for

Enforcing the Right to Effective Representation.

## § 99-15-17. Compensation of counsel; amount.

The compensation for counsel for indigents appointed as provided in Section 99-15-15, shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars (\$1000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed to or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars (\$200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the chancery court, county court or circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars (\$2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars (\$1000.00) per case. In addition, the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

**SOURCES:** Codes, 1942, § 2505-02; Laws, 1971, ch. 490, § 3; Laws, 1974, ch. 428; Laws, 1980, ch. 444, eff from and after October 1, 1980.

**Editor's Note** — The 1980 amendment increasing the amount of compensation to which appointed counsel is entitled is effective from and after October 1, 1980.

**Cross References** — Applicability of this section to counsel appointed by court as substitute for, or in addition to, public defender, see § 25-32-13.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Reimbursement of county in certain cases for compensation of counsel, see § 99-15-19.

Method of payment of compensation of counsel, see § 99-15-21.

## JUDICIAL DECISIONS

1. In general.
2. Constitutionality.

### 1. In general.

Defense counsel was sufficiently compensation where he was awarded \$32.10 per hour for his actual overhead; the figure was based on an initial amount of \$25.00 per hour for overhead and was adjusted upwards for inflation. *Evans v. State*, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Attorney who received \$11,000 from criminal defendant for trial representation, which amount was greater than that which he would have been entitled to by law (\$2,000 for trial and appeal), was not entitled to receive more money from county for appellate representation, even though defendant was declared indigent after trial. *Hunt v. State*, 687 So. 2d 1154 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1997).

Under statute which provides that defense counsel may receive maximum of \$1,000 for criminal trial and \$1,000 in appeal fees, additional monies for defense counsel's overhead expenses may also to be paid. *Hunt v. State*, 687 So. 2d 1154 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1997).

A justice court is a "court of record" as contemplated by this section; thus, appointed counsel who was representing indigent defendants at preliminary hearings in justice court was not limited to a fee of \$200 per case plus out-of-pocket expenses. *Gibson v. Board of Supvrs.*, 656 So. 2d 312 (Miss. 1995).

This section, which limits the compen-

sation which an attorney may receive for the representation of an indigent, does not amount to an unconstitutional taking of an attorney's property, deprive indigent defendants of the effective assistance of counsel, or violate the equal protection clause. The statute allows for "reimbursement of actual expenses," which can be interpreted to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case; there is a rebuttable presumption that a court-appointed attorney's actual overhead within the statute is \$25 per hour. This construction of this section will allow an attorney to receive \$1,000 in profit plus his or her actual expenses. A rebuttal presumption arises that the actual cost contemplated by the statute is the average of \$25 per hour; this figure may be subject to change when the 1988 survey conducted by the Mississippi State Bar is updated. The trial court is bound by the \$25 per hour figure only when proof to the contrary is not forthcoming. The hours submitted by an attorney are subject to scrutiny under a reasonable and necessary standard. Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include, but are not limited to, such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This interpretation of the statute avoids unconstitutionality on all grounds. *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990).

Although this section allows for the appointment of 2 attorneys in capital cases, a defense counsel's withdrawal of his motion for the appointment of additional



counsel did not constitute ineffective assistance of counsel where the defense counsel withdrew the motion because he had successfully developed the case and the case was not so complex that one attorney could not provide a legally sufficient defense. *Marks v. State*, 532 So. 2d 976 (Miss. 1988).

The trial court in a capital murder prosecution did not err in denying defendant's attorneys a reasonable amount by way of expenses in order to conduct an investigation into the mood and attitude of the community toward defendant in the furtherance of his motion for change of venue, notwithstanding the provisions of this section, where defendant had failed to outline any specific cost for the investigation. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

This section does not mandate that two attorneys be appointed to represent an indigent defendant in a capital case, but merely provides that two attorneys may be appointed. *Smith v. State*, 445 So. 2d 227 (Miss. 1984).

The matter of compensation of an attorney appointed to represent an indigent defendant is a matter resting with the legislature as a legislative function. *Young v. State*, 255 So. 2d 318 (Miss. 1971).

An attorney's fee in the amount of \$150, allowed under former Code 1942, § 2505 at the time of the trial, was not so inadequate as to be tantamount to a denial of due process of law as provided by the constitutions of the United States and of the State of Mississippi. *Young v. State*, 255 So. 2d 318 (Miss. 1971).

## 2. Constitutionality.

County was properly denied declaratory judgment that Miss. Code Ann. §§ 25-32-7, and 99-15-17, requiring counties to provide legal services for indigent criminal defendants violated Miss. Const. art. III, § 26 because the county did not show specific examples of when public defenders' legal representation fell below the objective standard of professional reasonableness. *Quitman County v. State*, 910 So. 2d 1032 (Miss. 2005).

## ATTORNEY GENERAL OPINIONS

The court appointed attorney may be reimbursed for fees and expenses incurred in representing the defendant up to the point in time that he was prohibited from practicing law; thereafter, he would be legally unable to represent the defendant and therefore, could not charge any fee for representation. *Pouncy*, Dec. 18, 1991, A.G. Op. #91-0868.

In context of this section, "court of record" is generic term, and refers to court where there is record for use on appeal. *Rogers*, Jan. 8, 1993, A.G. Op. #92-0936.

When a county public defender is appointed to represent a defendant on felony

charges in a municipal court preliminary hearing, the court should allow the public defender to withdraw if the felony charges are reduced to misdemeanors, the court should then determine if a court appointed attorney is appropriate on the misdemeanor charges, and if the public defender is appointed to represent the defendant on the misdemeanor charges, then the public defender is entitled to additional compensation from the municipality under this section. *Tucker*, Aug. 15, 1997, A.G. Op. #97-0500.

## RESEARCH REFERENCES

**ALR.** Right of court-appointed attorney to contract with his indigent client for fee. 43 A.L.R.3d 1426.

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent. 3 A.L.R.4th 576.

Validity, construction, and application of state recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 A.L.R.4th 597.

Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 A.L.R.4th 19.

Propriety of order under subsection (f) of Criminal Justice Act of 1964 (18 USCS

§ 3006(A)(f)) directing payment by or on behalf of party for services of court-appointed counsel. 51 A.L.R. Fed. 561.

**Am Jur.** 2B Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 270 (complaint, petition, or declaration against county for writ of mandamus to compel county to pay costs of representing indigent defendant in criminal action, court revoked finding of indigency subsequent to representation).

8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Form 43.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

Morris, Constitutional law: validity of attorney fee caps in indigent cases: Mississippi' challenge. 9 Miss. College L. R. 373, Spring, 1989.

## § 99-15-18. Compensation of counsel in post-conviction relief cases involving the death penalty; submission of interim invoice.

(1) Counsel employed by an office funded by the State of Mississippi or any county shall receive no compensation or expenses for representation of a party seeking post-conviction relief while under a sentence of death other than the compensation attendant to his office.

(2) Unless employed by such an office, counsel appointed to represent a party seeking post-conviction relief while under a sentence of death shall be paid at an hourly rate not to exceed eighty percent (80%) of the hourly rate allowed in the United States District Courts of the Northern and Southern Districts of Mississippi to attorneys appointed to represent defendants seeking habeas corpus relief.

(3) Counsel shall submit to the trial court, once each month, an interim invoice. Compensation earned and reimbursable expenses incurred each month shall be claimed on an interim invoice submitted not later than the fifteenth day of the following month, or the first business day thereafter. All interim vouchers shall be supported by detailed and itemized time and expense statements. The trial court shall review the interim invoices when submitted and will authorize compensation to be paid for seventy-five percent (75%) of the approved number of hours. The court shall also authorize for payment all reimbursable expenses, including fees and expenses of experts and of investigators, reasonably incurred. At the conclusion of the state-paid post-conviction representation, counsel shall submit a final voucher seeking payment for representation provided during the final interim period. The final invoice shall also set forth in detail the time and expenses claimed for the entire case,

including all documentation. Counsel shall reflect all compensation and reimbursement previously received on the appropriate line of the final invoice. Upon review and approval of the final invoice, the trial court shall authorize compensation to be paid for the approved number of hours provided during the final interim period, for all reasonable expenses reasonably incurred during the final interim period, and for the withheld twenty-five percent (25%) of hours approved in prior interim periods.

(4) All interim invoices will be maintained under seal during the pendency of state post-conviction proceedings. Upon submission by defendant's counsel of a final invoice, the trial court shall unseal the interim invoices unless the trial court determines that petitioner's interest requires a limited disclosure. In determining whether limited disclosure is appropriate, the trial court shall consider the need: (a) to protect the petitioner's Fifth Amendment right against self-incrimination; (b) to protect the petitioner's Sixth Amendment right to effective assistance of counsel; (c) the petitioner's attorney-client privilege; (d) the work product privilege of the petitioner's counsel; (e) the safety of any person; (f) whether petitioner intends to seek federal habeas corpus relief; and (g) any other interest that justice may require.

(5) Prior to payment of any fees in a case in excess of Seven Thousand Five Hundred Dollars (\$7,500.00) or expenses of investigation and experts in excess of Two Thousand Five Hundred Dollars (\$2,500.00), the application for such fees and expenses will be submitted to the Supreme Court for review of the award of the convicting court. If counsel believes that the court has failed to allow reasonable compensation, counsel may petition the Supreme Court for review. If counsel is appointed in successive post-conviction proceedings, such counsel shall receive reasonable compensation considering the services performed.

(6) The trial court shall also, upon petition by the party seeking post-conviction relief, authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate the post-conviction claims. The initial petition for such expenses shall present a credible estimate of anticipated expenses, and such estimate shall be updated from time to time as needed to inform the court of the status of such expenses. Payment of such expenses shall be made from funds in the Special Capital Post-Conviction Counsel Fund.

**SOURCES:** Laws, 2000, ch. 569, § 15; Laws, 2001, ch. 526, § 1, eff from and after July 1, 2001.

**Editor's Note** — Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.'"

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Method of payment of compensation of counsel, see § 99-15-21.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.



Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.  
Special Capital Post-Conviction Counsel Fund created, see § 99-39-117.

### **§ 99-15-19. Compensation of counsel; reimbursement of county in certain cases.**

Any county paying counsel fees and expenses incurred on appeal to the supreme court or by virtue of any prosecution charging the commission of a crime on the premises of the Mississippi State Penitentiary or the commission of a crime by any escapee therefrom, may request reimbursement of all such payments from the state treasurer. The state auditor shall issue his warrant, based upon a voucher sent by the treasurer of any county entitled to such reimbursement together with a certification that such sums have been allowed and paid. The state treasurer shall pay the amount of any such reimbursement out of any funds in the state treasury appropriated for such purpose.

**SOURCES:** Codes, 1942, § 2505-02; Laws, 1971, ch. 490, § 3, eff from and after passage (approved April 5, 1971).

**Cross References** — Method of payment of compensation of counsel, see § 99-15-21.

**Editor's Note** — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer whenever they appear. Section 27-104-6 provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

### **§ 99-15-21. Compensation of counsel; method of payment.**

All compensation and reimbursements allowed by the judge shall be made on the basis of an itemized statement as to time and nature of work and the expense incurred by the appointed counsel. The attorney general shall prepare and make available the proper form for the itemized statement which is to be submitted to the appropriate judge by the attorney or attorneys. Compensation and reimbursements authorized by Sections 99-15-15 through 99-15-21 shall be allowed only in cases in which the appointment is made subsequent to April 5, 1971. In all cases in which counsel have been appointed prior to said date, compensation shall be allowed in the same manner and to the same extent as provided by law at the time such appointment was made.

**SOURCES:** Codes, 1942, § 2505-03; Laws, 1971, ch. 490, § 4, eff from and after passage (approved April 5, 1971).

### **ATTORNEY GENERAL OPINIONS**

The district attorney must determine the amount of expenses incurred by a pretrial intervention program, and such expenses will be made a part of the initial agreement between the district attorney and the offender; the terms of such an

agreement must be approved by the court having jurisdiction. Anderson, August 27, 1999, A.G. Op. #99-0421.

The Department of Corrections (DOC) should contact the district attorneys to inform them of the expenses that are being incurred as a result of the DOC field support personnel supervising offenders in pretrial intervention programs; the district attorney may then put such expenses in the initial agreement between the D.A.

and the offender and may stipulate the method and manner of paying those expenses, i.e., directly to MDOC. Anderson, August 27, 1999, A.G. Op. #99-0421.

Payments made by an offender in a pretrial intervention program may be used to partially fund the salary of the assistant district attorney having pretrial intervention program duties. Knochel, Feb. 24, 2005, A.G. Op. 05-0090.

## RESEARCH REFERENCES

**ALR.** Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

**Am Jur.** 2B Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 270 (complaint, petition, or declaration against

county for writ of mandamus to compel county to pay costs of representing indigent defendant in criminal action, court revoked finding of indigency subsequent to representation).

## § 99-15-23. Plea entered when defendant stands mute.

If the defendant, on arraignment, refuses or neglects to plead, or stands mute, the court must cause the plea of “not guilty” to be entered, and the trial to proceed.

**SOURCES:** Codes, Hutchinson’s 1848, ch. 65, art. 2(51); 1857, ch. 64, art. 293; 1871, § 2757; 1880, § 3056; 1892, § 1407; Laws, 1906, § 1480; Hemingway’s 1917, § 1238; Laws, 1930, § 1261; Laws, 1942, § 2504.

**Cross References** — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

Arraignment, see Miss. Unif. Cir. & County Ct. Prac. R. 8.01.

Pre-trial publicity regarding the failure of the defendant to make any statement, see Miss. Unif. Cir. & County Ct. Prac. R. 9.01.

Omnibus hearings, see Miss. Unif. Cir. & County Ct. Prac. R. 9.08.

## JUDICIAL DECISIONS

1. Generally.
2. Plea by attorney.
3. Waiver of arraignment.
4. Withdrawal of plea.

### 1. Generally.

Although a defendant was entitled to a preliminary hearing, he was not prejudiced by the lack of one where he was afforded ample opportunity through his pretrial hearings to confront the State’s witnesses. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

One charged with a felony must plead to an indictment in person. Mareno v. State, 226 So. 2d 905 (Miss. 1969).

This section [Code 1942, § 2504] precludes a nolo contendere plea in a felony case. Bruno v. Cook, 224 So. 2d 567 (Miss. 1969).

Arraignment and plea are not jurisdictional under this section [Code 1942, § 2504] and failure of the record to show them will not cause reversal where the objection was not made as required by

law. *Arbuckle v. State*, 80 Miss. 15, 31 So. 437 (1901).

Before a person charged with crime can be put upon his trial, he must plead to the indictment or the issue must be made up for him. *Sartorius v. State*, 24 Miss. 602 (1852).

## 2. Plea by attorney.

One charged with a felony must plead to an indictment in person, and a plea of "guilty" entered by his attorney is invalid. *Mareno v. State*, 226 So. 2d 905 (Miss. 1969).

## 3. Waiver of arraignment.

A defendant effectively waived his right to a preliminary hearing when he agreed to, and executed with sureties, a recognizance bond. *Joseph v. State*, 524 So. 2d 576 (Miss. 1988).

In a prosecution for murder the court properly arraigned the defendant by entering for him a plea of "not guilty" when he stood mute in response to charges read to him by the court, where defendant's failure to reply to any of the charges in the indictment was on the advice of counsel due to the possibility that the arraignment might be improper and any pleas entered might constitute a waiver. *Crossley v. State*, 420 So. 2d 1376 (Miss. 1982).

Defendant may waive arraignment either expressly or impliedly. *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949).

Action of court in placing defendant, without arraignment, on trial for felonious assault with a deadly weapon with intent to steal and in entering a plea of "not guilty" on his behalf is not error, when defendant impliedly waives his right to arraignment by unjustly feigning insanity at time of trial as the jury found and standing mute when the trial court tendered an arraignment. *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949).

Where defendant was tried on two indictments for felonious assault on two

persons and the state elected to ask for a verdict on only one of them, the fact that defendant was not arraigned on such indictment is of no consequence since he is deemed to have waived any objections thereto by participating fully in the trial in all of its aspects without objection to his arraignment. *Lowe v. State*, 201 Miss. 618, 30 So. 2d 53 (1947).

An arraignment is not jurisdictional and may be waived by the defendant. *Thomas v. State*, 200 Miss. 220, 26 So. 2d 469 (1946).

An accused employing capable and reputable attorneys present with him at every step taken after return of the indictment, waives objection that he was at no time arraigned, if he is present and takes any part at all in the trial without raising the point except to move for a directed verdict after the state rests. *Thomas v. State*, 200 Miss. 220, 26 So. 2d 469 (1946).

Arraignment is waived where defendant takes part in the trial without objection as to the arraignment. *Thomas v. State*, 200 Miss. 220, 26 So. 2d 469 (1946); *Lowe v. State*, 201 Miss. 618, 30 So. 2d 53 (1947).

## 4. Withdrawal of plea.

Negro involved in a shooting scrape who, without benefit of counsel at arraignment under indictments charging manslaughter and assault and battery with intent to kill, stated that he was guilty of the shooting, whereupon the court entered orders that defendant pleaded guilty to the indictment, should have been permitted to withdraw the pleas of guilty made the following day before sentence supported by affidavit and uncontradicted evidence that defendant did not understand that he was pleading guilty to the charges in the indictment and that he had a meritorious defense, even though the defendant responded at the arraignment that he knew what he was doing and that he did not want a lawyer. *Pittman v. State*, 198 Miss. 797, 23 So. 2d 685 (1945).

## RESEARCH REFERENCES

**ALR.** Presentence withdrawal of plea of *nolo contendere* or *non vult contendere* under state law — Awareness of collateral

consequences of plea, and competency to enter plea. 10 A.L.R.6th 265.

Propriety of sentencing judge's imposi-



tion of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant — State cases. 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Particular circumstances as

constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Newly discovered or available evidence, and possible defense. 14 A.L.R.6th 517.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law § 605.

## § 99-15-24. Where to make motions or enter guilty pleas.

In criminal cases in circuit courts, unless otherwise provided by law, guilty pleas may be taken and motions may be heard in any county in the circuit court district that contains the county in which venue lies. Nothing in this section shall be construed as affecting venue for the purpose of bringing indictments or the conducting of jury trials.

**SOURCES:** Laws, 1986, ch. 347, eff from and after July 1, 1986.

## JUDICIAL DECISIONS

### 1. In general.

Defendant's offense was charged to have been committed in Lee County, which was in the First Circuit Court District, Miss. Code Ann. § 9-7-5, and any other circuit court in the First Circuit Court District could have accepted defendant's guilty plea, Miss. Code Ann. § 99-15-24; the Monroe County Circuit Court was in the First Circuit Court District, Miss. Code Ann. § 9-7-5, and therefore the Monroe County Circuit Court was an appropriate venue for defendant's guilty

plea to the Lee County charge, and thus all of defendant's arguments dependent on the impropriety of the venue for the plea were without merit. *Garner v. State*, 944 So. 2d 934 (Miss. Ct. App. 2006).

Where defendant answered questions from trial judge under oath, on the record, and in presence of counsel, during his plea hearing denying any coercion in pleading guilty, defendant's claim that his plea was involuntary was properly rejected. *Bradley v. State*, 845 So. 2d 756 (Miss. Ct. App. 2003).

## RESEARCH REFERENCES

**ALR.** Place of holding sessions of trial court as affecting validity of its proceedings. 18 A.L.R.3d 572.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Awareness of collateral consequences of plea, and competency to enter plea. 10 A.L.R.6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant — State cases. 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under

state law — Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law — Newly discovered or available evidence, and possible defense. 14 A.L.R.6th 517.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 600 et seq.

**CJS.** 22 C.J.S., Criminal Law §§ 141 et seq.

## § 99-15-25. Entry of guilty pleas in vacation; sentencing; records.

(1) Any person who is charged in any circuit or county court with the commission of a criminal offense by a proper affidavit, indictment or information in cases of misdemeanors or by indictment by the grand jury in cases of felonies, and who is represented by counsel, may, by his own election, appear before the judge of the court at such time as the said judge may fix in vacation of the court and be arraigned and enter a plea of guilty to the offense with which he is charged. Upon the entering of such plea of guilty, the judge shall have the power and authority to impose any lawful and proper sentence upon the defendant in vacation just as though the plea was entered and the sentence imposed during a regular term of the court.

(2) All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation just as though same were had and entered during term time.

**SOURCES:** Codes, 1942, § 2564.5; Laws, 1960, ch. 259, §§ 1, 2.

**Cross References** — Arraignment, see Miss. Unif. Cir. & County Ct. Prac. R. 8.01. Entry of guilty pleas in vacation, see Miss. Unif. Cir. & County Ct. Prac. R. 8.04. Time of sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01. Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01.

### JUDICIAL DECISIONS

1. In general.
2. Waiver of rights by plea.
3. —Exceptions.
4. Withdrawing guilty plea.
5. Rescinding plea bargain agreement.
6. Plea to crime not charged in indictment.

#### 1. In general.

Where defendant answered questions from trial judge under oath, on the record, and in presence of counsel, during his plea hearing denying any coercion in pleading

guilty, defendant's claim that his plea was involuntary was properly rejected. *Bradley v. State*, 845 So. 2d 756 (Miss. Ct. App. 2003).

Guilty plea is voluntary if defendant knows what elements are in charge against him or her, including understanding of charges and its relation to defendant, effect of plea, and possible sentence. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Complete record should be made of plea proceeding to ensure that defendant's plea

was entered voluntarily. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Judge is required by Uniform Criminal Rules of Circuit Court Practice, Rule 3.03 to "address" accused and determine that he understands nature and consequences of plea of guilty, including maximum and minimum penalties. *Wolfe v. Puckett*, 780 F. Supp. 408 (N.D. Miss. 1991).

Before a trial court may accept a guilty plea, it must have before it substantial evidence that the accused did commit the legally defined offense to which he or she is offering the plea. What facts must be shown are a function of the definition of the crime and its assorted elements. A factual showing does not fail merely because it does not flush out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings, and fair inference favorable to guilt may facilitate the finding. There must be enough that the court may say with confidence that the prosecution could prove the accused guilty of the crime charged. Thus, there was an adequate factual basis for a defendant's plea of guilty to murder, even though the defendant advised the trial court at the plea hearing that he "didn't do the shooting," where the defendant admitted that he was at the crime scene, the prosecution's summary of the proof showed guilt and was made in the defendant's presence, and, even taking the defendant's version of the facts, it was fairly inferable that a third party shot and killed the victim under circumstances where the defendant was an accessory before the fact. *Corley v. State*, 585 So. 2d 765 (Miss. 1991).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him or her, including an understanding of the charge and its relation to him or her, what effect the plea will have, and what the possible sentence might be because of the plea. Where a defendant is not informed of the maximum and minimum sentences he or she might receive, his or her guilty plea has not been made either voluntarily or intelligently. A complete record should be made to ensure that the defendant's guilty plea

is voluntary. While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal. *Wilson v. State*, 577 So. 2d 394 (Miss. 1991).

The fact that a defendant pled guilty to armed robbery in exchange for a 7-year sentence did not broaden the circuit court's sentencing authority; it was still statutorily limited. *Mitchell v. State*, 561 So. 2d 1037 (Miss. 1990).

Before a person may plead guilty to a felony, he or she must be informed of his or her rights, the nature and consequences of the act he or she contemplates, and any other relevant facts and circumstances. Thus, a defendant who was not advised of the mandatory minimum sentence for the charge to which he was pleading, and who was ignorant of the mandatory minimum sentence at the time he plead guilty, was entitled to withdraw his plea of guilty, enter a plea of not guilty and be given a trial, since the failure to advise the defendant of the minimum penalty rendered his guilty plea involuntary as a matter of law. *Vittitoe v. State*, 556 So. 2d 1062 (Miss. 1990).

## 2. Waiver of rights by plea.

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. *Anderson v. State*, 577 So. 2d 390 (Miss. 1991).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

## 3. —Exceptions.

The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment, with only 2 exceptions; the principle exception



to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived, and additionally, a guilty plea does not waive subject matter jurisdiction. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

#### 4. Withdrawing guilty plea.

A defendant who was not eligible for a suspended sentence or probation because he had previously been convicted of a felony would be permitted to withdraw his guilty plea where he pled guilty because of a plea bargain which included a recommendation by the State that he be given a suspended sentence. *Robinson v. State*, 585 So. 2d 757 (Miss. 1991).

#### 5. Rescinding plea bargain agreement.

A district attorney did not have unilateral authority to rescind a plea bargain agreement on the basis that the defendant had lied to him about certain key information even though the language of the "memorandum of understanding" gave the district attorney the right to rescind the agreement at any point if the defendant was untruthful. The question of whether a defendant failed to perform a condition precedent is an issue not to be finally

determined unilaterally by the government, but by the court on the basis of adequate evidence. *Danley v. State*, 540 So. 2d 619 (Miss. 1988).

#### 6. Plea to crime not charged in indictment.

A defendant waived his right to indictment for grand larceny, and thus his conviction for grand larceny could be used subsequently to sentence the defendant as a habitual offender, where the defendant was originally indicted for the burglary of 2 automobiles, the defendant appeared before the circuit court and testified under oath that he understood that he was charged with burglary of an automobile in each case, that he wished to withdraw his pleas of not guilty and enter pleas of guilty to related charges of grand larceny, that he understood the nature of the offense of grand larceny, and that he in fact committed those crimes. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

A plea of guilty to a crime separate and distinct from the crime charged in the indictment and not a constituent offense thereof is void and of no effect since the Mississippi Constitution requires indictment by a grand jury before a prosecution may be had. *Grayer v. State*, 519 So. 2d 438 (Miss. 1988).

### RESEARCH REFERENCES

**ALR.** Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 A.L.R.4th 1181.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary. 10 A.L.R.4th 689.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 A.L.R.4th 1089.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial. 17 A.L.R.4th 61.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 A.L.R.4th 251.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 A.L.R.4th 1121.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized. 87 A.L.R.4th 384.

Degree of mental competence, required of accused who pleads guilty, sufficient to satisfy requirement, of Rule 11 of Federal Rules of Criminal Procedure, that guilty pleas be made voluntarily and with understanding. 31 A.L.R. Fed. 375.

**Practice References.** Young, *Trial Handbook for Mississippi Lawyers* § 4:3.

G. Nicholas Herman, *Plea Bargaining* (Michie).

**§ 99-15-26. Dismissal of action upon successful completion of certain court-imposed conditions.**

(1) In all criminal cases, felony and misdemeanor, other than crimes against the person, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section. In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section. No person having previously qualified under the provisions of this section or having ever been convicted of a felony shall be eligible to qualify for release in accordance with this section. A person shall not be eligible to qualify for release in accordance with this section if such person has been charged (a) with an offense pertaining to the sale, barter, transfer, manufacture, distribution or dispensing of a controlled substance, or the possession with intent to sell, barter, transfer, manufacture, distribute or dispense a controlled substance, as provided in Section 41-29-139(a)(1), except for a charge under said provision when the controlled substance involved is one (1) ounce or less of marijuana; (b) with an offense pertaining to the possession of one (1) kilogram or more of marijuana as provided in Section 41-29-139(c)(2)(F) and (G); or (c) with an offense under the Mississippi Implied Consent Law.

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

- (i) Reasonable restitution to the victim of the crime.
- (ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.
- (iii) Payment of a fine not to exceed the statutory limit.
- (iv) Successful completion of drug, alcohol, psychological or psychiatric treatment or any combination thereof if the court deems such treatment necessary.
- (v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

(b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of a regimented inmate discipline program.

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

(6) This section shall take effect and be in force from and after March 31, 1983.

**SOURCES:** Laws, 1983, ch. 446, §§ 1-4; Laws, 1987, ch. 364; Laws, 1989, ch. 565, § 2; Laws, 1996, ch. 391, § 1; Laws, 1996, ch. 454, § 3; Laws, 2003, ch. 557, § 2; Laws, 2004, ch. 455, § 1; Laws, 2007, ch. 549, § 1, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment, in (1), deleted “Mississippi Code of 1972” following “Section 41-29-139(a)(1),” substituted “Section 41-29-139(c)(2)(F) and (G)” for “Section 41-29-139(c)(2)(D), Mississippi Code of 1972,” and made a minor stylistic change.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Provisions for relief for persons who pled guilty within six months prior to the effective date of this section, see § 99-15-57.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

## JUDICIAL DECISIONS

1. In general.
2. Malicious prosecution.

### 1. In general.

Had the State had sufficient evidence to retry the citizen for his 1979 arrest, it should have done so within the next 25 years, and the appellate court found that the trial court was without discretion to deny his motion to expunge the 1979 arrest following the 2003 amendment to Miss. Code Ann. § 99-15-26. *A.E.W. v. State*, 925 So. 2d 136 (Miss. Ct. App. 2006).

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former requires the entry of a sworn guilty plea before the circuit or county court while the

latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney’s felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. *Miss. Bar v. Cofer*, 904 So. 2d 97 (Miss. 2004).

Under Miss. Code Ann. § 99-15-26, if defendant successfully completes certain court-imposed conditions, the cause against defendant is dismissed and the case closed. As a result, a conditional dismissal pursuant to § 99-15-26 is different than a suspended sentence pursuant to Miss. Code Ann. § 47-7-33; consequently, defendant, who pled guilty and received a suspended sentence was not entitled to have the conviction expunged under Miss. Code Ann. § 99-15-26. *Turner v. State*, 876 So. 2d 1056 (Miss. Ct. App. 2004).

Trial court lacked jurisdiction to expunge defendant’s criminal record because the trial court did not withhold



acceptance of her guilty plea when defendant pled on September 23, 1996; the trial court sentenced defendant to regular probation; because defendant was not sentenced under Miss. Code Ann. § 99-15-26, her argument was without merit. *Smith v. State*, 869 So. 2d 425 (Miss. Ct. App. 2004).

Because an attorney entered a valid plea of guilty to charges of bribery under Miss. Code Ann. § 97-11-11, pursuant to the requirements of Miss. R. Disc. St. B. 6, the attorney demonstrated evidence of unprofessional and unethical conduct evincing unfitness for the practice of law, which warranted immediate suspension, and while the plea might later be withdrawn, the court found that this provided the attorney no relief from the application of Rule 6; furthermore, the court had the power to render immediate sanctions for admitted felonies under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. B. 6 without a hearing by a complaint tribunal. *Miss. Bar v. Shelton*, 890 So. 2d 827 (Miss. 2003).

The trial court properly imposed a sentence upon the defendant for his original crime where (1) the court specifically withheld acceptance of the defendant's guilty plea in accordance with the statute pending successful completion of two years non-adjudication probation, and (2) the defendant failed to make payments for restitution and court costs that had been ordered by the court as conditions of probation. *Porter v. State*, 777 So. 2d 671 (Miss. 2001).

Although there was no proof that a judge willfully intended to misuse this section, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated this section. *Mississippi Comm'n on Judicial Performance v. Byers*, 757 So. 2d 961 (Miss. 2000).

The Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of this section and Rule 6 of the Rules of Discipline for the Mississippi Bar. *Mississippi Bar v. Baldwin*, 752 So. 2d 996 (Miss. 1999).

Subsection (4) of this section gives circuit and county court judges the discretion to expunge the record of any person whose case was dismissed or whose charges were dropped or if there was no disposition of such case, including cases involving crimes against the person. *McGrew v. State*, 733 So. 2d 816 (Miss. 1999).

A trial court's imposition of a sentence of 49 ½ years imprisonment upon finding that the defendant had violated a plea agreement which provided that the charges against the defendant would be dismissed following restitution and 3 years of good behavior pursuant to this section, in spite of the defendant's argument that the maximum sentence he should have received was 3 years since the plea bargain required him to "go straight" for only 3 years as a condition of dismissal, since the defendant had not been adjudged guilty or sentenced for the original charges until the date when the 49 ½ year sentence was imposed, and therefore the 3-year period of conditional good behavior did not amount to a sentencing ceiling for double jeopardy purposes. *Wallace v. State*, 607 So. 2d 1184 (Miss. 1992).

In proceedings under this section, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions; where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior because to do so would expose the defendant to double jeopardy. *Wallace v. State*, 607 So. 2d 1184 (Miss. 1992).

A trial court may employ a lesser standard of proof than "beyond a reasonable doubt" in determining whether a defendant has violated the conditions of a dismissal under this section; thus, a trial court did not abuse its discretion by ruling that a defendant had violated the conditions of his dismissal under this section where the defendant had not yet been tried for the crimes constituting the violations. *Wallace v. State*, 607 So. 2d 1184 (Miss. 1992).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of

Mississippi has specifically authorized expungement of criminal offender records in limited cases—youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungement of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of this section may apply to the court for an order expunging his or her criminal records. Under § 99-15-57 and this section a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to § 99-15-57 and this section if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the “within 6 months prior to” March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the

criterion in any of the statutes authorizing expungement, and thus the trial court did not err in denying his petition for expungement. *Caldwell v. State*, 564 So. 2d 1371 (Miss. 1990).

Under this section, if the court-imposed conditions are not successfully completed, then the court is empowered to accept the guilty plea and impose sentence thereon. A defendant does not have a right to withdraw a guilty plea made under the provisions of this section. *Brown v. State*, 533 So. 2d 1118 (Miss. 1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 936 (1989).

This section authorizes the court to place a defendant on probation even though it does not use the specific word “probation.” *Brown v. State*, 533 So. 2d 1118 (Miss. 1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 936 (1989).

## 2. Malicious prosecution.

Arrestee’s claim for malicious prosecution on charges of conspiracy to plant drugs lacked merit where the criminal proceeding did not terminate in the arrestee’s favor because the arrestee pled guilty to a lesser crime of trespassing; the officers’ motion for summary judgment was granted. *Scribner v. Dillard*, 269 F. Supp. 2d 716 (N.D. Miss. 2003).

## ATTORNEY GENERAL OPINIONS

Non-adjudication statute, Miss. Code Section 99-15-26, does not exempt records of non-adjudication from Public Records Act. *Brown*, June 4, 1993, A.G. Op. #93-0356.

This section, which allows judge to withhold adjudication upon defendant’s completion of certain conditions, specifically does not apply to any offense under the Mississippi Implied Consent Law. *Stephens*, Jan. 12, 1994, A.G. Op. #93-0889.

Subsection (4) is not applicable to records of pretrial intervention programs. *Spann*, Jan. 24, 2000, A.G. Op. #99-0694.

Subsection (4) may only be used when a case is dismissed or charges are dropped or there is no disposition of a case; if a defendant is convicted, that conviction may not be expunged under the statute.

*Spann*, March 17, 2000, A.G. Op. #2000-0106.

The statute applies only to circuit or county courts and not to justice courts. *Knight*, Apr. 5, 2002, A.G. Op. #02-0152.

Where, pursuant to the provisions of this section, acceptance of a plea of guilty by a school board candidate is being withheld pending successful completion of the conditions set forth in an order of nonadjudication, there has been no conviction and, therefore, if the election commission finds that the individual in question is a qualified elector, has no previous felony convictions and meets all residency and other qualifications to hold the office, he would be eligible to have his name placed on the ballot. *Lagasse*, Sept. 27, 2002, A.G. Op. #02-0560.

A situation in which a co-tenant out of possession made tax payments to the county for a period of over twenty years following a tax sale since the co-tenant had no knowledge that said property was not in their possession any longer was subject to the requirement that a refund for erroneously paid taxes may only be made for taxes that were paid within three years prior to the date the petition seeking such refunds was filed with the board of supervisors. Griffith, Sept. 12, 2003, A.G. Op. 03-0423.

Defendant charged with exploitation of children under § 97-5-33(2) is not eligible for non-adjudication under this section. Terry, Sept. 5, 2003, A.G. Op. 03-0450.

Simple domestic violence as defined in § 97-3-7(3), is a crime against the person.

Municipal courts may not utilize the provisions of subsection (1) of this section to non-adjudicate criminal defendants charged with and pleading guilty to the offense of simple assault or simple domestic violence. Dawson, Jan. 23, 2004, A.G. Op. 04-0019.

This section necessarily implies that the Department of Corrections has the authority to accept limited custody of persons for the sole purpose of participating in and completing a Regimented Inmate Discipline (RID) Program as a condition of non-adjudication. Such person would not be an "inmate" or a "convict." Epps, Aug. 20, 2004, A.G. Op. 04-0275.

## RESEARCH REFERENCES

**ALR.** State court's power to place defendant on probation without imposition of sentence. 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Construction, as to terms and conditions, of state statute or rule providing for

voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 A.L.R.4th 778.

Admissibility of evidence of other offense where record has been expunged or erased. 82 A.L.R.4th 913.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 895 et seq.

## § 99-15-27. Copy of indictment and special venire to be given defendant in capital cases.

Any person indicted for a capital crime shall, if demanded by him by motion in writing before the completion of drawing of any special venire which is summoned to appear on the day of his trial, have a copy of the indictment and list of the special venire delivered to him or his counsel at least one (1) entire day before said trial.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 2(49); 1857, ch. 64, art. 294; 1871, § 2758; 1880, § 3057; 1892, § 1408; Laws, 1906, § 1481; Hemingway's 1917, § 1239; Laws, 1930, § 1262; Laws, 1942, § 2505; Laws, 1900, ch. 99; Laws, 1934, ch. 303; Laws, 1950, ch. 351; Laws, 1964, ch. 357; Laws, 1971, ch. 490, § 1; Laws, 1985, ch. 443, § 2, eff from and after July 1, 1985.

## JUDICIAL DECISIONS

1. Generally.
2. Necessity of written demand.
3. Time of demand.
4. Time of delivery.

5. Necessity of true copy.
6. Waiver.

### 1. Generally.

Procedure for special venire is available



to persons accused of certain serious crimes as matter of right, and such persons are entitled to have sheriff proceed in good faith and with due diligence to end that all persons listed upon special venire in fact be served and summoned for jury duty; it is not within sheriff's authority to decide unilaterally that there will be enough jurors at trial and make no further effort to summon unserved jurors after certain number of persons have been served. *Ratliff v. State*, 515 So. 2d 877 (Miss. 1987).

Defendant in a capital murder prosecution waived his request pursuant to § 13-5-77 and this section for a special venire and for a list of the veniremen so summoned, where he never objected to the failure to provide for the special venire, and where at least fifty jurors were considered prior to impaneling the twelve jurors and two alternates. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

One cannot complain that he did not obtain a special venire where, when court set aside its denial and offered to direct drawing of one, he withdrew his motion and announced readiness for trial. *Ross v. State*, 234 Miss. 309, 106 So. 2d 56 (1958).

Under this section [Code 1942, § 2505] providing for delivery of copy of return of special venire to defendant or his counsel, it is not error to deliver it to defendant, even though request has been made for its delivery to his lawyer. *Simmons v. State*, 208 Miss. 586, 45 So. 2d 149 (1950).

This section [Code 1942, § 2505] complied with where certified copy of indictment and special venire were delivered to defendant on a Friday night preceding trial which was set for a following Monday notwithstanding defendant's objection that it was not effective because of alleged illiteracy of defendant where defendant's

counsel was notified of the action on Saturday morning. *Patton v. State*, 207 Miss. 120, 40 So. 2d 592 (1949), error overruled, 207 Miss. 134, 41 So. 2d 55 (1949), appeal dismissed, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523 (1949).

List of special venire and copy of indictment need not be served on accused by sheriff. *Ivey v. State*, 154 Miss. 60, 119 So. 507 (1928).

The prisoner is not entitled to a copy of the regular venire for the statute only gives him a right to a copy of the special one. *McCarty v. State*, 26 Miss. 299 (1853).

## 2. Necessity of written demand.

Forcing defendant to trial without serving copy of indictment and special venire before trial held not error, where not demanded by written motion. *Gregory v. State*, 152 Miss. 133, 118 So. 906 (1928).

That copy of special venire was delivered before trial did not entitle defendant to demand copy of indictment without written motion. *Gregory v. State*, 152 Miss. 133, 118 So. 906 (1928).

## 3. Time of demand.

Although a special venire could have been demanded in an armed robbery prosecution if the demand had been timely made, the trial court did not abuse its discretion in overruling the defendant's motion for a special venire where the motion was made just prior to the start of trial. *Williams v. State*, 590 So. 2d 1374 (Miss. 1991).

A copy of the indictment and of the special venire and summons must be demanded before completion of the drawing of the special venire. *Estes v. State*, 127 Miss. 309, 90 So. 80 (1921).

It is too late on motion to quash the venire for the accused to demand a list of the venire. *Collier v. State*, 106 Miss. 613, 64 So. 373 (1914).

Under Code 1892, § 1408 [Code 1942, § 2505], it is within the judicial discretion of the court to deny a motion for a list of the special venire where the motion is not made until after the completion of the drawing of the venire. *Hannah v. State*, 87 Miss. 375, 39 So. 855 (1906).

## 4. Time of delivery.

Service of copy of indictment and special venire on accused at 4:50 o'clock on

afternoon of day before trial held not "one entire day before the trial." *Winchester v. State*, 163 Miss. 462, 142 So. 454 (1932).

"One entire day before trial" in this section [Code 1942, § 2505] means a day counted from midnight to midnight. *Boatwright v. State*, 120 Miss. 883, 83 So. 311 (1919); *O'Quinn v. State*, 131 Miss. 511, 95 So. 513 (1923); *Winchester v. State*, 163 Miss. 462, 142 So. 454 (1932).

#### 5. Necessity of true copy.

The fact that a summoned juror, who was present at court in a murder prosecution, and served on the panel without challenge for cause, was shown by the sheriff's return to have been "not found", did not constitute reversible error for failure to furnish defendant a true copy of the special venire upon request, in the absence of any showing that there was any censorable failure to find such juror, or that he was not duly qualified to serve as such. *Davis v. State*, 203 Miss. 574, 35 So. 2d 524 (1948).

The fact that four jurors, who were drawn and summoned by the sheriff, did not appear at the trial of the murder prosecution, did not constitute reversible error for failure to furnish defendant a true copy of the special venire upon request, where there was no showing of prejudice from the failure of those sum-

moned to appear, or that further compulsory process was resorted to without effect. *Davis v. State*, 203 Miss. 574, 35 So. 2d 524 (1948).

A mistake in the copy of the special venire by which the Christian names of the persons summoned are misrecited, if it occur by inadvertence and if no injury to the prisoner be occasioned thereby, is not a sufficient ground to sustain his objection to proceeding with the trial. *Browning v. State*, 33 Miss. 47 (1856).

The name of the same juror appearing twice on the venire without any collusion or improper design and without any real injury shown to have been done the prisoner by it, is not ground for error. *McCarty v. State*, 26 Miss. 299 (1853).

#### 6. Waiver.

Right of accused under this section [Code 1942, § 2505] to have copy of indictment delivered to him may be waived. *Simmons v. State*, 208 Miss. 586, 45 So. 2d 149 (1950).

Statement by trial judge that accused waived requirement of this section [Code 1942, § 2505] that copy of indictment be delivered to him must be given great weight by supreme court on appeal of defendant from judgment of conviction. *Simmons v. State*, 208 Miss. 586, 45 So. 2d 149 (1950).

### RESEARCH REFERENCES

**ALR.** Determination of indigency of accused entitling him to appointment of counsel. 51 A.L.R.3d 1108.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

### § 99-15-28. Accused entitled to copy of affidavit or indictment without cost.

Any person alleged to have committed a criminal offense in violation of a state law, or ordinance of any political subdivision, which upon conviction carries a sentence of any length of time or fine of any amount, shall be entitled, upon request made by such person or their counsel, to receive a copy of the affidavit or indictment at any time after such affidavit is filed or indictment returned, provided that any person alleged to have committed a felony shall not be entitled to receive a copy of the indictment until after his arrest or apprehension, and such indictment shall be governed according to the provisions of Section 99-7-13, Mississippi Code of 1972, until such time as the

person is arrested or apprehended. No charge or fee shall be imposed for any copy of an affidavit or indictment as herein provided.

**SOURCES:** Laws, 1973, ch. 367, § 1, eff from and after passage (approved March 23, 1973).

**Cross References** — Secret record of indictments, see § 99-7-13.

### RESEARCH REFERENCES

**Am Jur.** 21A Am. Jur. 2d, Criminal Law § 1257  
**CJS.** 21A C.J.S., Criminal Law § 1257 et seq.

### § 99-15-29. Continuance; application.

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom.

**SOURCES:** Codes, 1857, ch. 61, art. 151; 1871, § 633; 1880, § 1704; 1892, § 723; Laws, 1906, § 784; Hemingway's 1917, § 567; Laws, 1930, § 576; Laws, 1942, § 1520.

**Cross References** — Continuances where counsel is legislator, see § 11-1-9.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Granting of continuances for noncompliance with discovery, see Miss. Unif. Cir. & County Ct. Prac. R. 9.04.

### JUDICIAL DECISIONS

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|---|--|
| 1. Discretion of court.                                     | 8. Grounds for continuance, generally.           |
| 2. —In particular circumstances.                            | 9. —Time to prepare for trial; properly granted. |
| 3. Requisites and sufficiency of application and affidavit. | 10. —Properly denied.                            |
| 4. —Properly granted.                                       | 11. —Absence of witness; properly granted.       |
| 5. —Properly denied.  | 12. —Properly denied.                            |
| 6. Cross-examination of affiant.                            | 13. —Illness of witness; properly granted.       |
| 7. Time for application.                                    |  |



14. — — Properly denied.
15. — Absence of documents and other evidence.
16. — Absence or illness of defendant.
17. Miscellaneous.
18. Due diligence.
19. Setting aside continuance.
20. Appeal.

### 1. Discretion of court.

Trial court did not abuse its discretion in denying defendant's motion for a continuance where additional discovery materials were tendered to him at trial as the brief recess it gave defendant to review the material was adequate and defendant did not show he was prejudiced by not being given a longer recess. *Cunningham v. State*, 828 So. 2d 208 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in denying defendant's motion for a continuance where the prosecution on the day of trial produced 22 photographs that were similar to six other photographs that had already been presented to defendant and the prosecutor stipulated that it would not use the new photographs at trial. *Gray v. State*, 799 So. 2d 53 (Miss. 2001).

The granting of a continuance is largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of sound discretion. *Gates v. State*, 484 So. 2d 1002 (Miss. 1986).

Although capital cases are required to be tried during the term in which the indictment is returned, unless good cause is shown to the contrary, the granting of a motion by the defendant for a continuance is a matter largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of discretion. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

Refusal to grant a continuance is not ground for reversal unless the court abused its discretion and injustice has resulted. *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355 (1960).

Granting of a continuance is a matter that lies within the discretion of a trial judge and refusal of continuance will not

be grounds for reversal unless that discretion has been abused and the court is satisfied that injustice has resulted therefrom. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955).

A motion to pass case for two or three days so that defendant might have time in which to prepare case for trial, did not meet the requirements of this section [Code 1942, § 1520]. *Gatlin v. State*, 219 Miss. 167, 68 So. 2d 291 (1953).

A trial judge has a broad discretion in granting and refusing continuances. *Whittington v. State*, 215 Miss. 377, 60 So. 2d 813 (1952); *Williams v. State*, 216 Miss. 158, 61 So. 2d 793 (1953); *Gatlin v. State*, 219 Miss. 167, 68 So. 2d 291 (1953); *Hearn v. State*, 219 Miss. 412, 69 So. 2d 223 (1954); *Bucklew v. State*, 218 Miss. 820, 67 So. 2d 881 (1953); *Woodruff v. State*, 220 Miss. 24, 70 So. 2d 58 (1954); *Gillespie v. State*, 221 Miss. 116, 72 So. 2d 245 (1954).

Where there was no formal motion for a continuance or postponement as required by this section [Code 1942, § 1520] the refusal of court to allow a delay on the ground of surprise was not an error. *Douglas v. State*, 212 Miss. 176, 54 So. 2d 254 (1951).

A trial judge has broad discretion in granting and refusing continuances, and this section [Code 1942, § 1520] enjoins upon the supreme court the duty not to reverse a case because the trial court refuses a continuance unless the court is satisfied that injustice resulted therefrom. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947); *Lewis v. State*, 56 So. 2d 397 (Miss. 1952).

While procedure for invoking the discretion of the court in granting continuances is subject to the conformance with established rules, such rules are in turn subject to the circumstances of each case. *Jackson v. State*, 199 Miss. 853, 25 So. 2d 483 (1946).

While the granting or refusing of further time and continuances is largely discretionary with the trial judge, such discretion must be a sound judicial discretion having due regard to the rights of the public and of the defendant. *Cruthirds v. State*, 190 Miss. 892, 2 So. 2d 145 (1941).

The trial judge has discretion in granting or overruling motion for continuance,

and unless defendant is prejudiced by such ruling there will be no reversal. *Cox v. State*, 138 Miss. 370, 103 So. 129 (1925); *Ware v. State*, 133 Miss. 837, 98 So. 229 (1923).

The matter of granting a continuance is a matter of discretion of the court under all the facts. *Williams v. State*, 92 Miss. 70, 45 So. 146 (1907); *State v. Vollm*, 96 Miss. 651, 51 So. 275 (1910); *Ellis v. State*, 198 Miss. 804, 23 So. 2d 688 (1945); *Jackson v. State*, 199 Miss. 853, 25 So. 2d 483 (1946); *Cody v. State*, 24 So. 2d 745 (Miss. 1946); *Bolin v. State*, 209 Miss. 866, 48 So. 2d 581 (1950).

A judgment will not be reversed because a continuance is refused, unless there was an abuse of sound discretion by the trial court. *Solomon v. State*, 71 Miss. 567, 14 So. 461 (1893); *Lipscomb v. State*, 76 Miss. 223, 25 So. 158 (1898).

## 2. —In particular circumstances.

A trial court abused its discretion by refusing to grant a criminal defendant's request for a continuance, even though there was no demonstrative affidavit of evidence and prejudice against him and no proof as required under this section, where his court-appointed attorney indicated that he was not prepared for trial, the nature of the charges brought about by the multi-count indictment were uncertain, there was an extremely short period of time between arraignment and trial, and the State failed to provide certain discovery prior to trial. *Lambert v. State*, 654 So. 2d 17 (Miss. 1995), *aff'd*, 724 So. 2d 392 (Miss. 1998).

A trial court's denial of a defendant's 3 motions for continuance did not warrant reversal of his conviction where he failed to show that the denial of any of his motions for continuance was an abuse of discretion or that any injustice resulted, and in each instance where a problem arose, he in some way caused or contributed to the cause of the problem. *Johnson v. State*, 631 So. 2d 185 (Miss. 1994).

A circuit court abused its discretion when it refused to grant a continuance to the defendants in a prosecution for sale of cocaine where, approximately two months prior to trial, the court ordered the prosecution "to make diligent efforts to obtain the address of the confidential informant"

who set up the sales giving rise to the prosecution, and it was apparent on the eve of trial that the prosecution had done nothing to locate the informant. *Gowdy v. State*, 592 So. 2d 29 (Miss. 1991).

No abuse of discretion by trial court was found in denial of motion for continuance where defendant alleged he needed more time to prepare his claim of violation of right to speedy trial. *Hughey v. State*, 512 So. 2d 4 (Miss. 1987).

Trial judge did not abuse his discretion in denying defendants' motion for continuance to permit defense counsel to examine contents of, and to locate author of, 2 letters, purporting to exonerate defendant of armed robbery charge, which were allegedly written by the person whom defendant contended had actually perpetrated the robbery, where neither of the 2 persons indicted along with defendant admitted knowing the person named by defendant, and no attempt was made to introduce the letters into evidence. *Ex parte Baxley*, 496 So. 2d 688 (Ala. 1986).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. *Plummer v. State*, 472 So. 2d 358 (Miss. 1985).

In a prosecution for grand larceny, the refusal of the trial judge to grant a continuance to the defense would not be disturbed where the appeal did not have it in a record of proceedings or evidence presented to the court showing alleged prejudice to the defendant in support of the motion for a continuance. *Greene v. State*, 406 So. 2d 805 (Miss. 1981).

In a prosecution for incest, the trial court did not abuse its discretion in denying the defendant's motion for a continuance where one of the primary complaints in the motion had been that



counsel had not had an opportunity to interview the prosecuting witness and, in ruling on the motion, the court had directed the district attorney to present the witness and the defense attorney had had an opportunity to interview the witness at length before the trial. *Speagle v. State*, 390 So. 2d 990 (Miss. 1980).

In a robbery prosecution presenting neither a complex fact situation nor complex legal problems, wherein the defendant admitted taking part in the robbery charged and the jury found against her on her defense of duress, and the record showed that she received a fair and impartial trial during which she was ably defended, the overruling of her motion for continuance was not an abuse of discretion, even though the trial was held 4 days after appointment of counsel. *Brown v. State*, 252 So. 2d 885 (Miss. 1971).

Continuance is permissibly denied to one for whom court appointed counsel two days prior to trial, after he had been in jail for eight months, where it does not appear that any other witnesses would have been available if more time had been granted. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

In a prosecution for murder where the accused was put on trial two weeks after the commission of the offense and at the same term of court which had been in session at the time of the commission of the offense, there was no error. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955).

Where accused was arrested on July 11, 1954, for the crime of rape occurring on July 10, 1954, and indicted on July 12, 1954, and judgment was rendered on July 16, 1954, in the circuit court which was in regular July session, the record on appeal failed to establish any abuse of discretion by trial judge in overruling a motion for continuance on the ground that there was insufficient time to prepare a defense. *Robinson v. State*, 223 Miss. 70, 77 So. 2d 265 (1955), cert. denied, 350 U.S. 851, 76 S. Ct. 91, 100 L. Ed. 757 (1955).

Where defendants were free on bail for three months in prosecution for assault and battery with intent to kill and murder of highway patrolmen, it was their duty to exercise reasonable diligence in obtaining legal counsel and court did not abuse

discretion in denying an application for continuance. *Bolin v. State*, 209 Miss. 866, 48 So. 2d 581 (1950).

Where a killing occurred on July 15, defendant was indicted on August 22, arraigned on August 23, and put to trial on August 29, the appellant's counsel having a week in which to prepare for the trial and it was not shown that any witnesses whom he may have desired were unavailable and he did not renew his motion for continuance on the day the trial began and did not, after conclusion of the trial make a motion for new trial, the trial judge did not abuse his discretion and no prejudicial error resulted from his overruling a motion for continuance. *Newell v. State*, 209 Miss. 653, 48 So. 2d 332 (1950).

### 3. Requisites and sufficiency of application and affidavit.

Trial court's denial of a continuance was not reversible error, as the defendant offered no evidence as to additional witnesses who were unavailable to testify, as to what would have been added to the defense had additional time been granted, or as to what due diligence was used to procure absent witnesses or absent documents pursuant to Miss. Code Ann. § 99-15-29. *Stubbs v. State*, 845 So. 2d 656 (Miss. 2003).

Denial of defendant's motion for continuance to obtain presence of a witness, who was in federal custody in another state, on ground that motion was untimely was not an abuse of discretion; defendant only requested witness be present on Friday before trial, defendant relied solely on state to secure witness, process to secure such a prisoner generally required 30 to 90 days, and defendant failed to file an affidavit showing facts expected to be proven by absent witness, the name and address of witness, statement that affiant had used due diligence to obtain witness, and a statement that continuance was sought not for delay only. *Medina v. State*, 688 So. 2d 727 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997).

An application for a continuance based on the inability of a witness to testify due to illness should be governed by the procedure set forth in Code 1942 § 1520 when a continuance is sought because of the absence of a witness. *Smith v. State*,



278 So. 2d 454 (Miss. 1973), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474 (1973).

A motion for continuance which did not comply with the requirements of this section [Code 1942, § 1520] was properly overruled. *Lewis v. State*, 56 So. 2d 397 (Miss. 1952).

If defendant's request for continuance because of absence of witness is refused, defendant in criminal case must sue out proper process for witness and when case is called for trial must again apply for continuance, making such changes in affidavit as conditions then existing require; if still refused, he must persist in using process of court to compel attendance of witness on trial; and if convicted, on hearing of motion for new trial, and if appearance of witness cannot be had, his *ex parte* affidavit must be presented to court, if it can be obtained, on hearing of motion for new trial. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

To be entitled to continuance because of absence of witness, defendant must promptly have witness summoned, must ask for attachment if witness has been summoned and failed to appear, must apply for continuance before venire drawn, must set out in affidavit name and residence of absent witness and facts expected to be shown by him and what steps have been taken to secure his attendance, must negative idea that witness is absent with defendant's consent or procurement, and must give cause of witness' absence, if known. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

Defendant in criminal prosecution cannot complain of any error of court in refusing to grant continuance on ground that certain witnesses were absent when he does not comply with rule governing continuances and follow this up on motion for new trial with affidavits as to what witnesses would swear to, or give reasonable explanation of why affidavits are not procured. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

Formal application for continuance to secure testimony of absent witnesses must be followed by appearance of witnesses in court or production of their affidavits or showing as to why affidavits

could not be had. *Hinton v. State*, 175 Miss. 308, 166 So. 762 (1936).

Application for a continuance must set forth the substance of the testimony of the absent witness. This application on a motion for a new trial should be produced and made a part of the record. *Ware v. State*, 133 Miss. 837, 98 So. 229 (1923).

In deciding upon an application the court is not confined to a consideration of the matters stated in the affidavit but may inquire into the truth of the statements either by hearing other evidence or applying its own knowledge of what has occurred in the case up to the time. *Strauss v. State*, 58 Miss. 53 (1880).

#### 4. —Properly granted.

It is not reversible error to grant a continuance to the state despite the fact that the state failed to furnish the affidavit called for in 1972 Code § 99-15-29. *Wells v. State*, 288 So. 2d 860 (Miss. 1974).

#### 5. —Properly denied.

Denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on that ground; because defendant failed to assert in his motion for a new trial that the trial court had erred in failing to grant his motion for a continuance, the issue did not need to be reviewed on appeal. *Conner v. State*, 875 So. 2d 253 (Miss. Ct. App. 2004).

In a murder case where defendant alleged that he was not well represented by his public defense counsel and needed additional time to hire private counsel, the trial court did not abuse its discretion in denying defendant's motion for continuance because there was no prejudice to defendant in proceeding to trial with his two court-appointed attorneys, and defendant was given ample time in which to find alternative counsel prior to trial. *Rinehart v. State*, — So. 2d —, 2003 Miss. LEXIS 558 (Miss. Oct. 23, 2003).

Trial court's denial of a continuance was not reversible error, as the defendant offered no evidence as to additional witnesses who were unavailable to testify, as to what would have been added to the defense had additional time been granted, or as to what due diligence was used to

procure absent witnesses or absent documents pursuant to Miss. Code Ann. § 99-15-29. *Stubbs v. State*, 845 So. 2d 656 (Miss. 2003).

A judge did not abuse his discretion by denying a defendant's request for a continuance where the defendant failed to comply with the procedural guidelines set forth in this section in the presentation of his request for a continuance. *Edwards v. State*, 594 So. 2d 587 (Miss. 1992).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance even though the court had permitted the defendant to substitute counsel 3 days prior to trial where the substitution was permitted upon the representation of the substituted attorney that he would be ready for trial on the designated date. *Watson v. State*, 521 So. 2d 1290 (Miss. 1988).

A defendant waived his right to object to a discovery violation by his failure to request a continuance when the evidence in question was introduced, even though the trial court had previously stated that no more continuances would be granted to either side. Counsel must make a record regardless of the trial court's apparent unwillingness to rule in counsel's favor. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

In a prosecution for burglary, armed robbery, and kidnapping, the trial court did not err in denying a continuance requested by the defense where the only information received by the court by affidavit or otherwise was that a missing witness knew where the defendant had been on the day of the alleged crimes and where there was no showing as to whether or not the missing witness would ever be available to testify. *Woods v. State*, 393 So. 2d 1319 (Miss. 1981).

In a prosecution for capital murder, the trial court did not err in denying defendant's motion for a continuance in order to

locate two subpoenaed witnesses, where defendant failed to meet the requirements of this section in that his motion was not supported by an affidavit and did not state with particularity the material testimony expected from the absent witnesses, and where the testimony of the witnesses who eventually did appear at the hearing on a motion for a new trial did not add a new dimension to defendant's case. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831 (1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992).

In a prosecution for the embezzlement of a rented car, the trial court properly denied defendant's motion for a continuance where there was no compliance with this section and where, in any event, the motion was untimely. *Collins v. State*, 369 So. 2d 500 (Miss. 1979).

Defendant's ore tenus motion, made during trial and requesting a recess until a witness (for whom no subpoena or process had been issued or requested) could be brought to testify, was properly denied since it did not conform to the requirements of this statute, being unsworn, without attached affidavit, and failing to state that due diligence had been used to procure the witness or that the continuance was sought to do justice and not for delay only. *McClendon v. State*, 335 So. 2d 887 (Miss. 1976).

Defendant's motion for a continuance on account of the absence of a witness was properly denied where no subpoena for this witness was requested or issued until the day preceding the trial, it was conceded that the witness was not in the state, no showing was made in connection with the motion as to what the testimony of the absent witness would be or that his testimony was relevant or material, and, on appellant's motion for a new trial, neither the witness nor his affidavit was produced and there was no proof of any kind to show that his testimony would be relevant or material. *Dyer v. State*, 300 So. 2d 788 (Miss. 1974).



Where the motion of a defendant accused of murder for a continuance of the case for the term did not comply with the requirements of this section [Code 1942, § 1520], the trial court did not commit reversible error in the denial thereof. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958).

Denial of an application for continuance on the ground of absence of three witnesses was not error where one of the witnesses appeared and testified on behalf of the defendant, another witness was in military service beyond jurisdiction of the court, there was no showing that the third witness could have been brought in by exercise of reasonable diligence, and the application for continuance did not set forth their testimony. *Bynum v. State*, 222 Miss. 632, 76 So. 2d 821 (1955).

Where defendant moved for a continuance because of an absence of alleged material witness and defendant did not know where the witness might be found or as to what he would testify and the motion failed to comply with the rules, the continuance was properly denied. *Shoemaker v. State*, 222 Miss. 257, 75 So. 2d 647 (1954).

Where in requesting the continuance, the defendant did not set forth in his affidavit the facts which he expected to prove by the absent witnesses, if such witnesses could be found, or the names or places of residence of the absent witnesses and no showing was made that there was any reasonable probability that such witnesses could be obtained at a later date, the defendant's request would be denied. *Woodruff v. State*, 220 Miss. 24, 70 So. 2d 58 (1954).

In prosecution for unlawful possession of intoxicating liquors where defendant failed to file motion for continuance in a proper written form as prescribed by this section [Code 1942, § 1520], this was sufficient justification for the circuit court to refuse to grant the requested continuance. *Smith v. State*, 219 Miss. 741, 69 So. 2d 837 (1954).

Refusal to grant motion for continuance because of absence of material witness was held justified where due diligence was not shown and no effort on part of the defendant to procure the presence of the witness was made until the trial was

practically in progress and the motion for a new trial was not followed up by the affidavit of the absent witness. *Thigpen v. State*, 206 Miss. 87, 39 So. 2d 768 (1949).

A motion for a continuance because of the absence of a material witness is correctly denied when the absent witness was not in the jurisdiction of the court, had not been summoned, and his affidavit had not been obtained. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

Motion for continuance because of absence of a witness was properly overruled where her evidence would have been merely cumulative, it was not shown that she could be produced at a subsequent trial, and, on motion for a new trial, neither her affidavit showing what her testimony would be was produced nor was there any showing that production of such affidavit was impracticable. *Magee v. State*, 200 Miss. 861, 27 So. 2d 767 (1946), suggestion of error sustained, 200 Miss. 861, 28 So. 2d 854 (1947).

Refusal to grant continuance to secure testimony of absent witnesses held not error, where no sworn application was presented to court and continued diligence was not shown and neither absent witnesses nor their affidavits were presented on motion for a new trial. *Hinton v. State*, 175 Miss. 308, 166 So. 762 (1936).

An affidavit for continuance on the ground of the absence of a witness, which was in its nature an application for delay to give defendant an opportunity to make search for evidence not known to exist, was insufficient, and a denial of the application for continuance was proper. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

## 6. Cross-examination of affiant.

Where an accused sought a continuance on the alleged ground that he could not obtain his witnesses, but failed to comply with the requirements of Code 1942, § 1520 with reference to filing the proper affidavit, the motion was properly overruled. *Saucier v. State*, 259 So. 2d 484 (Miss. 1972).

Law relating to cross-examination on application for continuance is not applicable to criminal cases. *Hill v. State*, 152 Miss. 708, 120 So. 817 (1929).



Permitting district attorney to examine defendant over objection on application for continuance was erroneous; defendant, applying for continuance, has right to stand on application. *Hill v. State*, 152 Miss. 708, 120 So. 817 (1929).

Cross-examination of defendant on motion for continuance held, under circumstances, harmless error. *Hill v. State*, 152 Miss. 708, 120 So. 817 (1929).

#### 7. Time for application.

Where the state relies upon a sale made at a different time from that made in the indictment to the surprise of the defendant, a continuance should be asked before verdict if desired. *Peebles v. State*, 105 Miss. 834, 63 So. 271 (1913).

#### 8. Grounds for continuance, generally.

Where defendant had notice of a trial date that had been set for quite some time, a trial court did not err by denying defendant's motion for a continuance when he sought to fire his attorney on the morning of trial. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

There was no merit in defendant's claim that his defense counsel's performance was deficient due to his failure to request a continuance after the trial court denied his request for a change of venue, as defendant had failed to allege that any publicity additional to the four newspaper articles submitted during the change of venue hearing had occurred accordingly, there was no cause shown for seeking a continuance. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Trial judge did not abuse his discretion in refusing to grant a continuance where defendant did not follow the proper procedure for obtaining a continuance and it came to light that the witness was unavailable and would not be available to testify at any time in the foreseeable future. *McGee v. State*, 828 So. 2d 847 (Miss. Ct. App. 2002).

Trial court did not err in failing to continue the trial in the absence of a physician, a defense witness, because there was no indication that defendant acted with due diligence to obtain the presence of the physician at trial, nor was

there any evidence that the physician's testimony was material. *Evans v. State*, 844 So. 2d 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

Trial court erred in denying motion for continuance where district attorney first provided discovery only one day before date of trial, rejected was contention of district attorney that denial of continuance was warranted on grounds that defendant had failed to bring his discovery motion up for hearing on court's motion day and that there was no prejudice involved. *Stewart v. State*, 512 So. 2d 889 (Miss. 1987).

An application for a continuance based on the inability of a witness to testify due to illness should be governed by the procedure set forth in Code 1942 § 1520, when a continuance is sought because of the absence of a witness. *Smith v. State*, 278 So. 2d 454 (Miss. 1973), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474 (1973).

The application for continuance on the ground that the attorney for defendant has not had a reasonable time to prepare for trial is different from an application for continuance on the ground that there is an absent witness, for when a witness is absent the movant must continue his effort to obtain the witness after filing the motion required by this section [Code 1942, § 1520], but a motion for continuance upon the ground of insufficient time to prepare for trial is subject to proof and also to facts as they may appear from that which is known to the trial court. *Barnes v. State*, 249 So. 2d 383 (Miss. 1971).

A motion for a change of venue, rather than a motion for continuance, is the usual procedure where an accused fears that he will be unable to get an impartial jury because of prejudicial pretrial publicity. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368 (Miss. 1969).

No abuse of discretion is involved in denying a continuance sought on the ground that the state had been permitted to amend an indictment for burglary with respect to the ownership of the property. *Kelly v. State*, 239 Miss. 683, 124 So. 2d 840, 85 A.L.R.2d 1199 (1960).

Application for a continuance to the next term was properly denied where the

crime was committed in July, the indictment was had in October, the accused employed two attorneys the day the indictment was returned, all of the testimony involved one place and one occasion, all witnesses were available both to the state and to the accused and apparently all testified, and the court set the case for trial a week after hearing the motion. *Garner v. State*, 202 Miss. 21, 30 So. 2d 413 (1947).

After procuring continuance on affidavit by defendant setting out the testimony of absent witnesses, such witnesses may be cross-examined on such affidavit as to what defendant expected to prove by them. *McLeod v. State*, 130 Miss. 83, 92 So. 828 (1922).

On an application for continuance on the ground of the absence of a witness where it is agreed witness if present would state certain facts on the trial, it is error to permit opposing party to prove that such witness was present at a former trial and did not testify. *Smith v. State*, 90 Miss. 111, 43 So. 465, 122 Am. St. R. 313 (1907).

The fact that an absent witness is within the jurisdiction of the court is material in an application for a continuance. *Donald v. State*, 41 So. 4 (Miss. 1906).

#### **9. —Time to prepare for trial; properly granted.**

A trial court erred in failing to grant a defendant's motion for a continuance to allow additional time to prepare for trial where the defendant's attorney was retained only 8 days before trial, and the attorney was a sole practitioner who had to prepare pleadings and motions, do research, attend court, and interview witnesses in addition to running his law practice, so that the defendant was, in effect, being penalized for hiring a sole practitioner to represent her. *Hughes v. State*, 589 So. 2d 112 (Miss. 1991).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in

that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. *Plummer v. State*, 472 So. 2d 358 (Miss. 1985).

In a close case between murder and manslaughter, an injustice resulted when the court denied two motions for continuance and forced the defendant to go to trial 7 days after he was indicted for murder and just 15 days after the altercation which resulted in the death of the victim and the serious cutting of the defendant. *Cochran v. State*, 244 So. 2d 22 (Miss. 1971).

Defendant and his counsel should have been given more than a week to prepare for a murder trial, particularly where two motions for continuance were presented to the court: one listing pre-set required court appearances by defense counsel in other matters during the week before trial, and the other setting forth the absence of witnesses, two of them alleged to be eyewitnesses, and where both motions ended with a sworn statement that defendant and his counsel required more time to properly investigate and prepare for trial, and that the motion was made, not for delay, but that justice might be served. *Cochran v. State*, 244 So. 2d 22 (Miss. 1971).

#### **10. — Properly denied.**

Prosecution disclosed the identity and last known residence of the informant well before the scheduled trial, and the trial court gave defendant the opportunity to accept a continuance, but he was satisfied to go to trial without the informant or police chief present; there was no abuse of the trial court's discretion when it denied the continuance on the day of trial. *Hudderson v. State*, 941 So. 2d 221 (Miss. Ct. App. 2006).

In a case where defendant's attorney claimed that he was not given adequate time to review the discovery materials, prepare for trial, and consult with an independent medical expert, a trial judge denied his motion for a continuance because defendant's attorney was hired in January and attended defendant's habeas corpus hearing in March; also, his attor-



ney stated that he had worked on the case every day since he received the State's discovery materials. Furthermore, on the day of the trial, the trial court asked defendant's attorney whether he was ready for trial, and the attorney announced that he was ready; thus, the trial court did not abuse its discretion in denying the motion for a continuance. *McFadden v. State*, 929 So. 2d 365 (Miss. Ct. App. 2006).

Trial court did not abuse its discretion in denying defendant's motion for a continuance on the ground that defendant's attorney had been denied access to defendant on the day before trial, which was a Sunday, because defendant and his attorney had ample time to confer prior to trial. Further, the trial judge stated on the record that he had been available had defense counsel tried to contact him on Sunday. *Peters v. State*, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Defendant failed to show error in the trial court's denial of his motion for a continuance, there was no showing that defense counsel would have done anything differently had the trial court granted a motion for continuance before the start of trial. *Stack v. State*, 860 So. 2d 687 (Miss. 2003).

Defendant failed to sustain his burden of showing that the trial court abused its discretion in denying defendant's motion to continue his trial for statutory rape where the record on appeal was silent as the reasons for the requested continuance or why additional time was needed for trial. *Farrish v. State*, 840 So. 2d 820 (Miss. Ct. App. 2003).

Defendant's request for a continuance so that he could be granted a competency hearing was properly denied, because defendant did not display behavior that would even remotely lead someone to believe that he was incompetent to stand trial. *Reeves v. State*, 825 So. 2d 77 (Miss. Ct. App. 2002).

Motion for continuance made by replacement counsel because he was retained eight days before trial was properly denied since defendant had failed to preserve the issue for appeal and did not show how he was prejudiced by the denial as he was found not to be guilty of addi-

tional crimes for which he was tried. *Jones v. State*, 801 So. 2d 751 (Miss. Ct. App. 2001).

Where there was no discovery violation by the state and the defendant failed to present his counsel with a witness list, he was not entitled to a continuance so as to allow further preparation of his defense. *Fikes v. State*, 749 So. 2d 1107 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion in denying a continuance in a manslaughter prosecution to allow the defendant more time to test the victim's blood for LSD and PCP; the day before a witness expressed surprise that his blood had turned up negative for drugs because the witness believed he was using acid where (1) the defendant had previously taken a tape-recorded conversation with the same witness in which the witness claimed she knew nothing of the defendant using drugs, and (2) the record showed that, other than alcohol, the victim's blood tested negative for six commonly abused drugs. *Swindle v. State*, 755 So. 2d 1158 (Miss. Ct. App. 1999).

There was no manifest injustice resulting from the denial of a continuance, notwithstanding the contention that defense counsel was informed the day before trial that the case would not be tried the next day, that believing the case to be continued, the defendant's counsel had him appear at the courthouse merely to sign an order of continuance, that upon arriving at the courthouse, the defendant was informed that he would go to trial that day, and that, consequently, the defendant argued that he did not have his witnesses appear in court; the defendant was aware of the date of trial for two and a half months, his trial was designated as "first out" two weeks before trial, he was told the day before trial that his case may be preempted by another case but it was not a certainty, and he did not proffer at trial nor on appeal any additional witnesses nor did he attempt to delineate their testimony. *Easley v. State*, 744 So. 2d 822 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion in refusing to grant a continuance where the record demonstrated that the defendant retained his own counsel who



represented him at trial and had adequate time to secure and hire additional counsel, and where he failed to show that his trial counsel was not fully prepared for trial. *White v. State*, 746 So. 2d 953 (Miss. Ct. App. 1999).

A motion for a continuance was properly denied, notwithstanding the contention that defense counsel needed more time to locate and interview witnesses, where defense counsel never proffered any evidence naming the witnesses or setting forth the nature of their testimony. *Hayes v. State*, 723 So. 2d 1182 (Ct. App. 1998).

A defendant was not entitled to a continuance on the ground that he did not receive discovery material in sufficient time to make use of it where he did not request the material until 3 weeks before trial, he received the requested information 5 days before trial, and he failed to request a continuance until the day before trial. *May v. State*, 569 So. 2d 1188 (Miss. 1990).

When an accused appears on the morning of trial with a new lawyer and requests a continuance, the trial court does not abuse its discretion in denying the continuance. *Byrd v. State*, 522 So. 2d 756 (Miss. 1988).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance where the newly appointed defense attorney had 24 days to prepare for trial. *Fisher v. State*, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

A defendant was not entitled to discharge his court-appointed counsel and substitute a retained attorney as counsel on the day of the trial where the case had "dragged on" for a long period of time, had been set for trial on a date certain, and would be delayed by the appearance of the retained counsel, who had requested a continuance. *Harrison v. State*, 520 So. 2d 1352 (Miss. 1987).

Trial court may deny capital murder defendant's request for continuance due to unavailability of defense fingerprint expert where court concludes that fingerprint expert would testify that fingerprints of murder victim and no one else had been found at scene of crime. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert.

denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

In a prosecution for capital murder the trial court properly denied a motion for a continuance, where no proof was offered in support of the motion. *Oates v. State*, 421 So. 2d 1025 (Miss. 1982).

In a prosecution for aggravated assault, the trial court did not err in denying defendant's motion for a continuance, even though defendant contended that the case was complex and that his attorney was involved in several other cases and did not have enough time to prepare, where defendant's privately employed attorney had eight days to prepare for trial, where he was an experienced attorney and former district attorney who vigorously represented defendant at trial, and where the record did not show prejudice by the refusal to grant a continuance or that his attorney's case load had precluded proper representation of defendant. *Shaw v. State*, 378 So. 2d 631 (Miss. 1979).

Where an indictment originally charged the theft of a number of articles of personal property, and at the trial the district attorney asked leave to amend the indictment by eliminating all but four of the articles listed, and the accused claimed surprise and asked for a continuance on the ground that he had prepared to meet the indictment and had a witness who would testify that some of the articles eliminated by the amendment were not in fact stolen, the amendment was properly permitted and the motion for continuance was properly denied. *Stevens v. State*, 232 So. 2d 730 (Miss. 1970).

The circuit court did not err in refusing to grant an accused a continuance on the ground that his attorney had not had adequate opportunity to prepare, where the accused had expressly asked the court for a speedy trial whereupon the case was set within 6 weeks, but on the call date the attorney for the accused advised the court that he did not represent the accused, whereupon the court appointed him to defend the accused and set the case up a week, and where, further, at the trial the accused was ably represented in a defense which was obviously well prepared. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368 (Miss. 1969).

In prosecution for felonious assault by cutting with knife, overruling motion for continuance on trial date is not abuse of court's discretion when indictment was returned on February 25, 1949, defendant was arraigned on February 28th, cause set for trial on March 2, defendant plead not guilty to indictment and stated he could procure services of attorney and court passed case to March 10th, attorneys were employed March 9th, and court passed case to March 11, 1949 when trial was held, and defendant was ably represented. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

Refusal to grant continuance on third trial of prosecution for rape, which trial took place some two weeks after employment of new counsel for defendant, did not constitute a denial of defendant's right to effective representation by counsel contrary to the Fourteenth Amendment of the United States Constitution, where more than two years had elapsed since the commission of the offense, such counsel had advantage of voluminous and comprehensive briefs, records and opinions of the court in two previous trials and the assistance of two investigators to help them in preparing for the trial. *McGee v. State*, 40 So. 2d 160 (Miss. 1949), appeal dismissed, cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950).

#### 11. —Absence of witness; properly granted.

There was no indication that the trial judge abused his discretion, nor that manifest injustice occurred when the trial judge granted the State's request for a recess over the weekend because (1) neither the State nor the defense's subpoenas of the witnesses had been served; and (2) allowing the State to begin presenting evidence on Monday would allow it to present its case continuously and was done in an effort to reduce confusion to the jury. *Forkner v. State*, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

No manifest injustice resulted from the denial of defendant's motion for continuance as defendant did not present any evidence that he was unable to call an allegedly exculpatory witness during his

three-week trial. *Cox v. State*, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003).

Failure of counsel to issue subpoenas even for friendly, favorable witnesses is perilous, because if for some reason witness fails to appear, prerequisite for continuance is that he or she is either under process or reasonable effort has been made to serve him or her with subpoena. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

In order to be entitled to continuance because of absent witness, counsel must demonstrate to court that he or she "has used due diligence" to secure witness' presence; embraced therein is requirement that counsel has made timely effort to place absent witness under subpoena. *Triplett v. State*, 666 So. 2d 1356 (Miss. 1995).

Defendant is entitled to continuance to compel presence of doctor who has evaluated mental capacity of defendant where failure to grant continuance will result in lack of expert testimony as to defendant's mental capacity, which is major issue in case. *Carter v. State*, 473 So. 2d 471 (Miss. 1985).

Where, in a grand larceny prosecution, motion for continuance was seasonably made and contained sworn averments that defendant, charged with the theft of sheep, purchased them from a witness who was the only witness to the transaction, that such witness was on board ship at sea as a member of the merchant marine and was unavailable as a witness, that process for him had been requested but he could not be reached or communicated with, that defendant had used due diligence to reach him and that he would be available at the next term of court, trial court abused its discretion in denying a continuance. *Jackson v. State*, 199 Miss. 853, 25 So. 2d 483 (1946).

Where defendant was arrested for unlawful possession of whiskey in the county, immediately arraigned without the presence of his attorney, and trial was set for 8:30 A.M. the next day, and his attorney, who arrived just five minutes before trial time, having been previously engaged in chancery court in another county, requested time to confer with the



defendant and prepare his defense, refusal of such request, trial and conviction of defendant were erroneous as denying defendant a fair and impartial trial, notwithstanding that defendant's principal witness was out of the state in view of statement in affidavit in support of such request that he would voluntarily appear and testify if given an opportunity to do so. *Cruthirds v. State*, 190 Miss. 892, 2 So. 2d 145 (1941).

Where subpoena for wife of defendant as a witness in murder case was issued but falsely returned as having been personally served, and, upon discovery, a second subpoena was issued which disclosed that the witness could not be found in the county designated therein but there was information that she could be found in another county, defendant's application for continuance, showing that the witness was a material witness, should have been granted. *Brooks v. State*, 108 Miss. 571, 67 So. 53 (1915).

Where, in a criminal case, defendant's affidavit, made on application for continuance on the ground of the absence of a witness, showed that the absent witness was a resident of the county, that she was away without defendant's procurement, that her absence was temporary, and that her testimony would prove defendant's innocence, and there was nothing to suggest that the application was not made in good faith, the trial court should have granted a continuance, notwithstanding that the witness was outside the jurisdiction of the court, in view of the short time between the indictment and the trial and the fact that persons charged with crime should have a reasonable time in which to procure witnesses. *Cade v. State*, 96 Miss. 434, 50 So. 554 (1909).

Where murder case was set for trial only eight days after indictment and preparation for defense was promptly begun and process issued for defendant's witnesses, and it appeared that one witness lived in another county and could not be found, but was willing to and could appear at the next term of court, application for continuance should have been granted. *Woodward v. State*, 89 Miss. 348, 42 So. 167 (1906).

It is a dangerous exercise of judicial discretion to refuse a continuance and a

postponement of the trial to a future day of the term, where the affidavit alleges material facts, where all diligence has been shown and where it is averred that the same proof can be made by no other than the absent witness. *Long v. State*, 52 Miss. 23 (1876).

## 12. — Properly denied.

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in failing to grant defendant's motion for a continuance since the record contained no affidavits or any other indication that anyone knew a probationer's whereabouts, and there was no indication that the probationer would likely have been available at some time in the future. *Jackson v. State*, — So. 2d —, 2007 Miss. App. LEXIS 104 (Miss. Ct. App. Feb. 27, 2007).

Trial court did not err in denying defendant's motion for a continuance based on a newly discovered witness; also, the trial court did not err in denying the motion for a continuance to permit the testimony of another officer about whether the cocaine came from defendant or another individual because, after proffering the information that the unavailable officer would have been able to provide, defendant's attorney did not show how the potential information could have been relevant to defendant's trial. *Harris v. State*, 921 So. 2d 366 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922 (Miss. 2006).

Where defendants did not name witnesses or state what facts were peculiarly within the unnamed witnesses' knowledge, and admitted that they did not know of any particular witnesses, and that they hoped to investigate further, they were not granted a continuance under Miss. Code Ann. § 99-15-29. *Johnson v. State*, 872 So. 2d 65 (Miss. Ct. App. 2004).

No manifest injustice resulted from the denial of defendant's motion for continuance as defendant did not present any evidence that he was unable to call an allegedly exculpatory witness during his three-week trial. *Cox v. State*, 849 So. 2d 1257 (Miss. 2003).

Trial judge did not abuse his discretion in refusing to grant a continuance where defendant did not follow the proper proce-



dure for obtaining a continuance and it came to light that the witness was unavailable and would not be available to testify at any time in the foreseeable future. *McGee v. State*, 828 So. 2d 847 (Miss. Ct. App. 2002).

The trial court properly denied the defendant's motion for a continuance based on the absence of a witness for whom two subpoenas had been issued where (1) the only action taken by the defendant or his attorney with regard to the witness was to ask the police chief if the police department had served process on the witness, which was in fact done, and (2) the motion did not detail the substance of the testimony of the absent witness or allege that the witness could be produced at a succeeding term of court. *Buckley v. State*, 772 So. 2d 1059 (Miss. 2000).

The trial court acted within its discretion in denying the defendant's last minute continuance request based on the absence of a witness because the materiality of the unavailable proof was, at best, marginal, and it seemed substantially likely that most, if not all, of it would prove to be inadmissible hearsay. *Swanagan v. State*, 759 So. 2d 442 (Miss. Ct. App. 2000).

Where the defendant failed to set forth the expected testimony of the witnesses and failed to utilize diligence in securing their attendance, the trial court did not abuse its discretion in denying defendant's motion for a continuance. *Fikes v. State*, 749 So. 2d 1107 (Miss. Ct. App. 1999).

Defendant was not entitled to continuance based on absence of witness where defendant issued no subpoena, defendant offered no proof of absent witness' testimony or that he attempted to procure the witness' attendance, there was adequate time for preparation between indictment and trial, and there were no discovery violations. *Atterberry v. State*, 667 So. 2d 622 (Miss. 1995).

Trial court did not err in denying defendant continuance due to absence of daughter, who defendant said was material witness suddenly unavailable, where defendant did not follow statutory and case law requirements, did not issue subpoena for daughter or her mother, and did

not present daughter or her affidavit when he moved for new trial. Defendant alleged he did not discover daughter would be unavailable until evening before trial and it was impossible for him to issue subpoena and he could not issue affidavits required by statute. *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988).

Circuit Court did not abuse its discretion in refusing to grant motion for continuance upon grounds that alibi witness was absent where trial judge instructed jury that it could consider, with other testimony, assertion of defendant that he would call witness who would testify that defendant was at house of witness at time and on night of rape. *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

It is contemptuous of obligation every trial counsel owes court to wait until 10 days before predetermined trial date in capital murder case to inform circuit judge of unavailability of defense expert witnesses in case in which at least 30 pretrial motions are made by thorough and aggressive defense counsel; in such case, motion for continuance on basis of absence of witnesses is properly denied. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

In a prosecution for aggravated assault, the record did not support granting a mistrial nor a continuance (even though one was never requested) due to the absence of two witnesses who were not under subpoena, and who had left the state shortly prior to trial, where defense counsel was bound to have known that both were possible witnesses from a consultation with his client, a decision to issue defense subpoenas for them were not made until the night before trial, no effort was made to subpoena them until the morning of the trial, and where, on the morning of the trial, both the state and the defense announced that they were ready. *Watson v. State*, 465 So. 2d 1025 (Miss. 1985).

In a prosecution for the sale of less than one kilogram of marijuana, the trial court did not abuse its discretion in denying the defendant's motion for a continuance in

order to obtain the presence of a confidential informant where the defendant had no right to call the informant as an adverse witness or to cross-examine him and where the defendant had previously been granted continuances from two terms to procure this witness but had failed to ask for an attachment against him. *Tribbett v. State*, 394 So. 2d 878 (Miss. 1981).

In a prosecution for aggravated assault upon a police officer, the trial court did not abuse its discretion in denying a defense request for a continuance owing to the absence of a witness where the witness was described by the defense as "hiding from the law" and there was a distinct probability that he would be unavailable indefinitely or at least for an extended period of time. *Norman v. State*, 385 So. 2d 1298 (Miss. 1980).

In a prosecution for aggravated assault with a deadly weapon, the trial court did not abuse its discretion in overruling defendant's motion for a continuance made so that a subpoenaed witness to a previous altercation between defendant and his victim could be located, where the victim had admitted that the altercation had occurred, and where both defendant and his girlfriend had also testified regarding the prior incident; the testimony of the subpoenaed witness would have been merely cumulative. *Graham v. State*, 381 So. 2d 138 (Miss. 1980).

In a homicide prosecution, the trial court did not err in overruling defendant's motion to extend the trial proceedings into the next day in order to allow defendant additional time to locate a witness, where defense counsel admitted to having learned about the witness earlier that day, but no subpoena had been requested by him, and where no attempt had been made to follow the statutory procedure dealing with applications for a continuance. *Herring v. State*, 374 So. 2d 784 (Miss. 1979).

Defendant's motion for a continuance on account of the absence of a witness was properly denied where no subpoena for this witness was requested or issued until the day preceding the trial, it was conceded that the witness was not in the state, no showing was made in connection with the motion as to what the testimony

of the absent witness would be or that his testimony was relevant or material, and, on appellant's motion for a new trial, neither the witness nor his affidavit was produced and there was no proof of any kind to show that his testimony would be relevant or material. *Dyer v. State*, 300 So. 2d 788 (Miss. 1974).

There was no error in a trial court's failure to grant a continuance to enable the defendant, charged with unlawfully driving an automobile, to obtain process upon an alleged witness, where there was nothing in the motion to show the whereabouts of the witness or any suggestion that the witness would likely be available at any future time, since the issue as to whether or not a continuance should be allowed is largely discretionary. *Parham v. State*, 229 So. 2d 582 (Miss. 1969).

The court's refusal to continue a case to afford the sheriff more time to locate a defense witness, was not an abuse of discretion, where no showing was made that the witness, whom the defendant subpoenaed on the day of the trial, but who could not be found, was available or that his testimony would be relevant and material upon the question of the guilt or innocence of the defendant. *Graham v. State*, 229 So. 2d 548 (Miss. 1969).

Where there was no proper showing as to the findings of the doctor who had examined the defendant to determine his sanity or what a doctor would testify to, and defendant's motion for a new trial contained no affidavits or other evidence indicating what the absent witness might testify to, or indicating any prejudice to the defendant, trial court did not commit reversible error in overruling defendant's motion for a continuance on the grounds of absence of a doctor as a witness, it further appearing that the witness had not been subpoenaed until the morning of the day of the trial. *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355 (1960).

Continuance because of absence of witness beyond the jurisdiction of the state will be denied where attorneys did not exercise the persistence and diligence required. *Simmons v. State*, 206 Miss. 535, 40 So. 2d 289 (1949).

Refusal of trial court in murder prosecution to grant defendant continuance be-



cause of absence of material witness, upon whom an attachment had been served, but who was physically unable to attend the trial, did not constitute reversible error where there was no affidavit of the absent witness, or other showing as to what witness would have testified to, or in what respect the testimony of such witness would have supported a defense of justifiable homicide. *Spearman v. State*, 204 Miss. 865, 35 So. 2d 527 (1948).

Denial of new trial grounded upon refusal of continuance on account of absence of witnesses by whom defendant claimed he could prove an alibi in prosecution for grand larceny, was warranted where defendant failed to procure the affidavits of such witnesses as to what their testimony would have been. *Russell v. State*, 203 Miss. 883, 34 So. 2d 722 (1948).

Denial in murder prosecution of motion for continuance alleging that absent witness would testify that on day of homicide and only shortly before it occurred deceased made a deadly assault on accused's codefendant and threatened to kill him on sight, was not error, where accused himself testified repeatedly that he knew of no trouble between deceased and codefendant. *Criss v. State*, 202 Miss. 184, 30 So. 2d 613 (1947).

Refusal of a continuance is not error where the absent witness' testimony would only have been cumulative and tended to impeach that of a state's witness, these facts being indicated in a letter from the witness who gave no affidavit although she could have done so. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947).

Motion for continuance in manslaughter prosecution on ground of absence of witness was properly overruled where no proof was offered and the motion contained no information as to the whereabouts of the witness or set out sufficiently what efforts were made to secure his attendance or ascertain his whereabouts, and witness had not been served with process and no further process was requested, and where no motion was made for a new trial and the affidavit of the absent witness was not produced. *Cody v. State*, 24 So. 2d 745 (Miss. 1946).

Trial court in prosecution for unlawful cohabitation did not abuse its discretion

in denying application for continuance because of absence of witness who was in the armed forces, where no subpoena had been issued or requested for him, there was no showing that he would be available at any future trial of the case, and witness' testimony given at previous trial of defendants for the same offense was read to the jury with consent of the district attorney. *Strong v. State*, 199 Miss. 17, 23 So. 2d 750 (1945).

Denial of continuance in murder prosecution because of inaccessibility of material witness did not constitute abuse of discretion where proposed testimony related to alleged threat by deceased against accused and accused was defending on the ground of self defense against an actual battery. *Kilgore v. State*, 198 Miss. 816, 23 So. 2d 690 (1945).

Trial judge in murder prosecution did not abuse his discretion in refusing to grant defendant a continuance on the ground that a material witness was in the armed forces abroad, where the proposed testimony of the witness concerned an alleged threat by the deceased against defendant, whereas defendant sought to justify his act as being in self defense against an actual battery during which he gave ground against an aggressive and continued assault by deceased. *Kilgore v. State*, 198 Miss. 816, 23 So. 2d 690 (1945).

Refusal in murder prosecution to grant a continuance based upon absence of a nonresident witness was not error, where defendant had made no effort to procure witness's presence at the trial and there was no proof that he would likely be available as a witness at any future trial of the case. *Ellis v. State*, 198 Miss. 804, 23 So. 2d 688 (1945).

It was not error to deny continuance because of absence of a witness who could testify as to dying declaration of one shot by defendant to the effect that he would have shot defendant if his gun had been loaded, where application for continuance was silent as to whether deceased would have shot in self-defense or as an aggressor. *Woulard v. State*, 137 Miss. 808, 102 So. 781 (1925).

Refusal to grant continuance to defendant charged with assault with intent to murder on the ground of the absence of a



witness who allegedly saw prosecuting witness soon after he was shot and to whom prosecuting witness related the details of the shooting, was error, where prosecuting witness denied having stated the facts which defendant alleged would be proved by the absent witness. *Cade v. State*, 96 Miss. 434, 50 So. 554 (1909).

### 13. —Illness of witness; properly granted.

Trial court's refusal to grant a continuance to a father, who was charged with shooting a 17-year-old boy for slapping his daughter, was erroneous, where the affidavit in support of the motion for continuance showed that the accused's wife, a witness to the shooting, was hospitalized and averred that she would testify that the victim was the aggressor to the affray and that the accused shot in apparent self defense, and it further appeared that as a result of the absence the witness, the accused was compelled to testify in his own behalf whether he had desired to do so or not, since otherwise the state's case would have stood undisputed. *Ivy v. State*, 229 Miss. 491, 91 So. 2d 521 (1956).

In prosecution for knowingly receiving stolen property where defendant made a motion for continuance on the ground that his wife who was a material witness in his behalf was confined to hospital and unable to appear, an overruling of the motion was error. *Whittington v. State*, 215 Miss. 377, 60 So. 2d 813 (1952).

A defendant is entitled to a continuance on account of the absence of his wife who is a material witness for him and is sick and unable to attend. *Walker v. State*, 129 Miss. 449, 92 So. 580 (1922).

The court cannot adjourn to a place where a sick witness resides to take testimony of such witness; the court should have granted the continuance asked for on that ground. *Carter v. State*, 100 Miss. 342, 56 So. 454, Am. Ann. Cas. 1914A,369 (1911).

A material witness within the jurisdiction of the court properly served with process but sick and unable to testify and no other witness by which such facts can be proven entitles to continuance. *State v. Vollm*, 96 Miss. 651, 51 So. 275 (1910).

### 14. — Properly denied.

There was no abuse of discretion in denying a continuance on the ground of

absence of a witness where the motion, made on day of trial, was unsupported by proper proof that the witness was actually in a hospital, and, the movant-accused made no offer of more evidence about the absent witness, failed to renew motion after evidence at trial indicated the witness was in hospital and, on motion for new trial, made no attempt to present the witness to the court for examination. *Gates v. State*, 484 So. 2d 1002 (Miss. 1986).

In prosecution for robbery where testimony of prosecuting witnesses was overwhelming in identifying the accused as the perpetrator of robbery, the fact that one defense witness whose testimony would show that one prosecuting witness had first identified someone else as guilty party was unable to testify because of illness, was not error where the court denied continuance. *Payne v. State*, 215 Miss. 390, 61 So. 2d 146 (1952).

A motion for continuance was properly overruled where the state admitted the context of the testimony proposed to be obtained from witnesses summoned but failing to appear because of illness. *Sistrunk v. State*, 200 Miss. 437, 27 So. 2d 606 (1946).

### 15. —Absence of documents and other evidence.

Defendant's request for a continuance to procure a toxicology report and to locate three witnesses was properly denied because defendant suffered no manifest injustice as a result: (1) a forensic pathologist testified that the victim had a blood-alcohol content of .03 at the time defendant shot and killed him and that the victim had inhaled some marijuana shortly before defendant shot him; and (2) defendant had months before his trial to locate the witnesses, interview them, and subpoena them for trial. Defendant did not indicate to what those witnesses would have testified or how their testimony would have benefitted the defense, and defendant made no effort to comply with Miss. Code Ann. § 99-15-29. *Gilbert v. State*, 934 So. 2d 330 (Miss. Ct. App. 2006).

There is no abuse of discretion in denying defendant's motion for a continuance on the ground that the reporter had been

unable to make a transcript of proceeding on a preceding mistrial, where defendant has other methods of establishing what the state's witnesses had testified to, and the case is otherwise ready. *Holmes v. State*, 242 Miss. 407, 134 So. 2d 485 (1961).

This section [Code 1942, § 1520] is not controlling except in the case of an absent witness or documents, one being accused of crime being entitled to be present and to be tried only when he is physically and mentally capable of intelligently conferring with his counsel as to the merits of the case and testifying in his own behalf. *Eastland v. State*, 223 Miss. 195, 78 So. 2d 127 (1955).

#### **16. —Absence or illness of defendant.**

Where the accused was physically unable to intelligently confer with his counsel and there was testimony of four physicians that he was too ill to stand trial, it was an error to deny a motion for continuance, even though the right to grant or deny continuance is in trial court's discretion. *Eastland v. State*, 223 Miss. 195, 78 So. 2d 127 (1955).

Sickness of defendant resulting from the drinking of large quantities of liquor before trial is not ground for continuance. *Bourne v. State*, 103 Miss. 628, 60 So. 724 (1913).

Where one accused of unlawful sale of intoxicating liquor was physically unable to attend her trial and it was shown that she was the only material witness to contradict the contentions of the prosecution, it was error to refuse her a continuance to the next term or to a later day in the term when she could be present. *Corbin v. State*, 99 Miss. 486, 55 So. 43 (1911).

A defendant too ill to attend trial for misdemeanor should have her case continued. *Hoggett v. State*, 99 Miss. 844, 56 So. 172 (1911); *Johnson v. State*, 108 Miss. 709, 67 So. 177 (1915).

#### **17. Miscellaneous.**

Defendant failed to meet his burden of proof that the trial court's denial of a continuance was an abuse of discretion where the trial court had an opportunity to view defendant, consider his appearance, and to hear argument of counsel on

the issue. *Piercy v. State*, 850 So. 2d 219 (Miss. Ct. App. 2003).

The defendant failed to show that manifest injustice resulted from the denial of a continuance she requested on the grounds that she did not know a transcript of her first trial existed until the morning of the second trial and was therefore denied the use of the transcript to impeach witnesses as a review of the record did not show any prejudice suffered by her. *Bogan v. State*, — So. 2d —, 2000 Miss. App. LEXIS 233 (Miss. Ct. App. May 16, 2000).

A trial court did not err in refusing to delay the trial until the defendant, who was deaf, could be taught to use sign language where the court had no way of ascertaining whether the defendant would learn sign language nor the degree to which it could improve his ability to understand and communicate, the defendant was able to read, he was a high school graduate and a college student, and he was kept advised of what was being argued and what testimony was being presented during the trial. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

Trial court did not abuse its discretion in refusing a continuance on grounds that there was a variance between the indictment charging attempted murder and the capias charging assault and battery with intent to kill, where both the capias and a copy of the indictment were served on the defendant, and before the request for a continuance was considered, a demurrer to the indictment was filed, argued and overruled, therefore showing that defense counsel must have known the indictment charged the crime of attempted murder. *Ledet v. State*, 286 So. 2d 817 (Miss. 1973).

Defendant was not entitled to a continuance so that he could work and earn money with which to employ an attorney, nor was he entitled to a continuance so that his relatives might agree to help him obtain an attorney. *Burnett v. State*, 285 So. 2d 783 (Miss. 1973).

The voluntary substitution of counsel by a litigant during the course of trial is not, of itself, grounds for a continuance. *Ladnier v. State*, 273 So. 2d 169 (Miss. 1973).

In prosecution for murder a motion for continuance on the ground that publicity



given to a previous trial of codefendant in the same murder would deny the defendant a fair trial, was properly denied when it was not shown that the conditions were changed, the granting of a continuance being largely within the discretion of the trial judge. *Sorber v. State*, 225 Miss. 436, 76 So. 2d 234 (1954), cert. denied, 349 U.S. 948, 75 S. Ct. 876, 99 L. Ed. 1274 (1955), reh'g denied, 350 U.S. 876, 76 S. Ct. 120, 100 L. Ed. 774 (1955).

No abuse of discretion by trial court was shown in denying a motion for continuance of manslaughter trial on ground that relative of one of defendant's attorneys had been killed and others seriously injured in accident four days before day set for trial where the record failed to show that before the summoning of the venire, the court had been requested to pass the case for trial, experienced associate counsel appeared to have the case well in hand when tried, and the denial did not prevent the defendant from producing any witness desired. *Williams v. State*, 26 So. 2d 64 (Miss. 1946).

### 18. Due diligence.

Denial of defendant's motion for continuance to obtain presence of a witness, who was in federal custody in another state, on ground that motion was untimely was not an abuse of discretion; defendant only requested witness be present on Friday before trial, defendant relied solely on state to secure witness, process to secure such a prisoner generally required 30 to 90 days, and defendant failed to file an affidavit showing facts expected to be proven by absent witness, the name and address of witness, statement that affiant had used due diligence to obtain witness, and a statement that continuance was sought not for delay only. *Medina v. State*, 688 So. 2d 727 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997).

In a prosecution for delivery of a controlled substance and possession of a controlled substance with intent to distribute, the trial court did not abuse its discretion when it denied the defendants' motion for a continuance to afford them "an opportunity to locate the confidential informer" where the defendants had previously obtained a continuance because the informant was not available and spent

six months "doing nothing," the defendants did not file the motion at issue until the day before trial, there was nothing in the record detailing the prosecution's efforts, or lack thereof, to produce the confidential informant, and there was nothing suggesting prosecutorial bad faith while the record reflected substantial defense dilatoriness. *Bosarge v. State*, 594 So. 2d 1143 (Miss. 1991).

In a prosecution for forgery of a check, the trial court did not err in refusing to grant a continuance to the defendant where the record failed to show that the defendant had used due diligence to procure the presence of an absent witness. *Harper v. State*, 394 So. 2d 311 (Miss. 1981).

Refusal to grant motion for continuance because of absence of material witness, was held justified where due diligence was not shown and no effort on part of the defendant to procure the presence of the witness was made until the trial was practically in progress and the motion for a new trial was not followed up by the affidavit of the absent witness. *Thigpen v. State*, 206 Miss. 87, 39 So. 2d 768 (1949); *Ford v. State*, 227 So. 2d 454 (Miss. 1969).

Cases in which defendant used reasonable diligence to have material witness present who was then in the jurisdiction of the court in which it is held a continuance should have been granted. *Watts v. State*, 90 Miss. 757, 44 So. 36 (1907); *Magee v. State*, 45 So. 360 (Miss. 1908); *White v. State*, 95 Miss. 75, 48 So. 611 (1909); *Dobbs v. State*, 96 Miss. 786, 51 So. 915 (1910).

### 19. Setting aside continuance.

Reversal by court of order allowing continuance and reinstatement of the case in the absence of defendants and their attorney, constituted an abuse of discretion. *Jackson v. State*, 199 Miss. 853, 25 So. 2d 483 (1946).

The continuance should not be set aside on petition of disinterested third parties in the absence of accused or his attorney. *Campbell v. State*, 50 So. 499 (Miss. 1909).

### 20. Appeal.

Decision to grant or deny continuance is left to sound discretion of trial court, and unless manifest injustice appears to have



resulted from denial of continuance, the Supreme Court should not reverse. *Atterberry v. State*, 667 So. 2d 622 (Miss. 1995).

Defendant who does not raise failure to grant continuance as ground in motion for

new trial is procedurally barred from raising issue on appeal. *Pool v. State*, 483 So. 2d 331 (Miss. 1986), cert. denied, 476 U.S. 1160, 106 S. Ct. 2280, 90 L. Ed. 2d 722 (1986).

## RESEARCH REFERENCES

**ALR.** Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 A.L.R.2d 1314.

Right to accused to continuance because of absence of witness who is fugitive from justice. 42 A.L.R.2d 1229.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

**Am Jur.** 17 Am. Jur. 2d, Continuance §§ 47-49 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 151 et seq. (continuance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 49 et seq.

**CJS.** 22A C.J.S., Criminal Law §§ 876 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 3:2.

## § 99-15-31. Continuance; capital cases.

Application for continuance in capital cases shall not be entertained after the drawing of any special venire which is summoned to appear on the day the case is set for trial, except for causes arising afterward, unless a good excuse be shown for not having made the application before.

**SOURCES:** Codes, 1880, § 3059; 1892, § 1409; Laws, 1906, § 1482; Hemingway's 1917, § 1240; Laws, 1930, § 1263; Laws, 1942, § 2506; Laws, 1985, ch. 443, § 3, eff from and after July 1, 1985.

**Cross References** — Continuance where counsel is legislator, see § 11-1-9.

## JUDICIAL DECISIONS

### 1. In general.

Under this section [Code 1942, § 2506] one charged with a felony less than capital is not entitled to greater consideration than one who was charged with a capital felony. *Hathorn v. State*, 225 Miss. 77, 82 So. 2d 653 (1955).

Where a defendant asks for a continuance because of the absence of a witness before the special venire is drawn and it is overruled, and he fails to renew his application at the trial and does not complain thereof in his motion for a new trial, he cannot secure the reversal in the supreme court of an adverse judgment because

thereof. *Lamar v. State*, 63 Miss. 265 (1885).

The court may refuse an application for a continuance on the ground of the absence of any witness who had not been subpoenaed and made his appearance prior to the drawing of the special venire, "unless for cause coming to the knowledge of the defendant after the drawing of the special venire." *Penn v. State*, 62 Miss. 450 (1884).

A defendant is not entitled to a continuance when his case is called for trial on the ground of the absence of a witness who, having been subpoenaed before the

drawing of the special venire, was then absent, unless good cause can be shown for his failure to make the application

before the drawing of the venire. *Fletcher v. State*, 60 Miss. 675 (1882).

## RESEARCH REFERENCES

**ALR.** Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 A.L.R.2d 1314.

**Am Jur.** 17 Am. Jur. 2d, Continuance §§ 106-108.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 171 et seq. (continuance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 49 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 3:2.

## § 99-15-33. Continuance; admission of facts in absence of witness.

In all cases of application for continuance, it shall be lawful for the state or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the same effect as if the absent witness or other evidence were present in court, and no more; but if compulsory process will probably obtain the attendance of the absent witness, and the defendant have not had opportunity of obtaining such process, the cause shall be continued, unless the defendant desire a trial.

**SOURCES:** Codes, 1857, ch. 64, art. 302; 1871, § 2806; 1880, § 3077; 1892, § 1425; Laws, 1906, § 1498; Hemingway's 1917, § 1256; Laws, 1930, § 1279; Laws, 1942, § 2522.

## JUDICIAL DECISIONS

### 1. In general.

A motion for continuance was properly overruled where the state admitted the context of the testimony proposed to be obtained from witnesses summoned but failing to appear because of illness. *Sistrunk v. State*, 200 Miss. 437, 27 So. 2d 606 (1946).

At the first term of court after indictment and arrest of defendant the defendant is entitled to a continuance on account of the absence of a material witness within the jurisdiction of the court. *Walton v. State*, 87 Miss. 296, 39 So. 689 (1905); *Knox v. State*, 97 Miss. 523, 52 So. 695 (1910).

Error in refusing a continuance because of the absence of a witness is not cured by permitting defendant to read in evidence an affidavit averring what the witness

would swear if present. *Scott v. State*, 80 Miss. 197, 31 So. 710 (1902); *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (1904).

It is proper under this section [Code 1942, § 2522] to charge that the same weight should be given to the written testimony of an absent witness as would be given to his oral testimony on the stand. *Lee v. State*, 75 Miss. 625, 23 So. 628 (1898).

Absence of a material witness is no ground for a continuance even in a capital case if there have been opportunity for compulsory process which has not been obtained. *Thomas v. State*, 61 Miss. 60 (1883).

The statute has no application until the showing for a continuance has been so made out to the satisfaction of the court that, but for the proposed admission of the

evidence of the absent witness, a continuance would be proper. *Strauss v. State*, 58 Miss. 53 (1880).

## RESEARCH REFERENCES

**ALR.** Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

**Am Jur.** 17 Am. Jur. 2d, Continuance §§ 20, 64-67.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 3:2.

## § 99-15-35. Change of venue; how need shown; grounds.

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 6; 1857, ch. 64, art. 298; 1871, § 2762; 1880, § 3061; 1892, § 1411; Laws, 1906, § 1484; Hemingway's 1917, § 1242; Laws, 1930, § 1265; Laws, 1942, § 2508.

**Cross References** — Transfer of records to removal court, see § 99-15-37.

Change of venue in capital cases, see § 99-15-43.

Pre-trial publicity, see Miss. Unif. Cir. & County Ct. Prac. R. 9.01.

## JUDICIAL DECISIONS

1. In general.
2. Examination of witnesses.
3. Reasons for change.
4. Review.
5. Particular circumstances.
6. Publicity.
7. Fair trial.
8. Discretion.

### 1. In general.

Trial court did not abuse its discretion in denying defendant's motion for a change of venue as the presumption the State acknowledged was raised, that defendant could not obtain an impartial jury in the county where the murder victim resided, was rebutted by the State's evidence that most veniremen did not know about the crime and the absence of any

persuasive proof of overly prejudicial pre-trial publicity. *Grayson v. State*, 806 So. 2d 241 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329 (2002).

An application for change of venue must conform strictly to this section. *Baldwin v. State*, 732 So. 2d 236 (Miss. 1999).

An application for change of venue was statutorily deficient where the motion for change of venue itself was not sworn to by the prisoner as is specifically required by this section. *Baldwin v. State*, 732 So. 2d 236 (Miss. 1999).

Usual procedure employed when accused believes he cannot get impartial jury in particular county is motion for change of venue. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).



Decision to grant venue change is in sound discretion of trial judge. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Presumption that impartial jury could not be impaneled may be rebutted by state's demonstration that impartial jury was actually impaneled, for purposes of determining whether venue was proper. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

Trial court did not abuse its discretion in denying change of venue request in highly publicized trial where close study of record revealed that no reasonable jury could have returned different verdict. Defendant had introduced 6 witnesses who were employed by various media outlets who all testified they provided thorough news coverage of murder investigation; state only produced 2 witnesses who testified they thought defendant could receive fair trial and they had not heard of community sentiment of ill will toward defendant or prejudgment of his guilt. All but 8 of 79 persons in venire stated they had heard about case but court determined that jury did not compromise defendant's right to fair trial where record revealed that 14 prospective jurors who had heard about murder and formed opinion as to defendant's guilt or innocence were questioned and excused for cause; of remaining prospective jurors who indicated they had heard about case, all indicated they could render a verdict based only on evidence presented at trial. *Lutes v. State*, 517 So. 2d 541 (Miss. 1987).

When accused has complied with proper application requirement by making motion supported by affidavits of 2 or more witnesses in conformance with this section, presumption arises that impartial jury may not be obtained; this presumption is normally rebuttable and may be rebutted during voir dire; however, this does not mean that trial court should delay ruling on defendant's motion until after voir dire. *Lutes v. State*, 517 So. 2d 541 (Miss. 1987).

Even in light of the relaxation of change of venue requirements announced in recent cases, a defendant, in order to obtain a change of venue, is required to make some showing by testimony of local citizens that he cannot receive a fair trial in

the community. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

The proper application requirement for change of venue is a motion supported by affidavits of 2 or more witnesses, alleging that by prejudgment of the case, or a grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed. *White v. State*, 495 So. 2d 1346 (Miss. 1986).

The decision regarding a change of venue in a criminal proceeding is committed to the sound discretion, not the unfettered discretion, of the trial judge. *White v. State*, 495 So. 2d 1346 (Miss. 1986).

Trial judge did not abuse his discretion in overruling homicide defendant's motion for change of venue, where there was no over-saturated media coverage, and, with one exception, newscast's and articles were typical and objective, and, since record did not contain the voir dire of prospective juror, it must be assumed that jurors who were seated had stated that they could give defendant a fair trial. *Weeks v. State*, 493 So. 2d 1280 (Miss. 1986).

A motion for change of venue was properly denied as being invalid, where it was not supported by affidavits of two or more credible persons. *Gilliard v. State*, 428 So. 2d 576 (Miss. 1983), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (1983), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In a prosecution for capital murder, the trial court properly denied the defendant's motion for a change of venue, where the motion was not supported by affidavits of two or more credible persons as required by this section. *Gentry v. State*, 416 So. 2d 650 (Miss. 1982).

The defendant whose motion for a change of venue fails to comply with the requirements of Code 1942, § 2508 cannot on appeal assert that he was entitled to such a change by reason of pretrial publicity tending to prejudice the jury. *Fabian v. State*, 267 So. 2d 294 (Miss. 1972).

Under the Fourteenth Amendment right to an impartial jury a defendant in a state misdemeanor prosecution to be tried by a jury must be given an opportunity to show that a change of venue is required in his case because of community prejudice against him, and a state law which categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against him is labeled a misdemeanor, is unconstitutional. *Groppi v. Wisconsin*, 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971), conformed to, 50 Wis. 2d 407, 184 N.W.2d 88 (1971).

In a murder prosecution, the court properly overruled defendant's motion for a change of venue, which was made after the special venire had been summoned and while the jury was being impaneled to try the defendant, and which was not supported by the affidavits of two or more credible persons. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957).

Denial, dictated into the record by the state, that a prisoner cannot get a fair and impartial trial does not meet the requirement that an affidavit for change of venue be met by the state by proof. *McGee v. State*, 200 Miss. 350, 26 So. 2d 680 (1946).

It is not necessary that the prisoner himself swear to the application for change of venue where it appears from the affidavit of counsel filed before trial that the prisoner seems to be either insane or so shocked and mentally unbalanced since his arrest as to be unable to make a coherent statement and aid counsel in preparation of his defense. *McGee v. State*, 200 Miss. 350, 26 So. 2d 680 (1946).

An application for a change of venue must conform strictly to this section [Code 1942, § 2508]. *Purvis v. State*, 71 Miss. 706, 14 So. 268 (1894).

The prepayment of costs cannot be made a condition precedent to a change of venue. *Rattray v. State*, 61 Miss. 377 (1883).

## 2. Examination of witnesses.

Application for change of venue in murder case held to present prima facie showing for change which state had right to contest by evidence. *Wexler v. State*, 167 Miss. 464, 142 So. 501 (1932).

A proper application for change of venue present a prima facie showing for a change, which may be contested by the district attorney or the court may examine witnesses. *Magness v. State*, 103 Miss. 30, 60 So. 8 (1912).

The statute does not give defendant a right to change of venue necessarily upon his compliance with its terms. The court has the right to examine other witnesses. *Weeks v. State*, 31 Miss. 490 (1856); *Mask v. State*, 32 Miss. 405 (1856); *Cavanah v. State*, 56 Miss. 299 (1879); *Dillard v. State*, 58 Miss. 368 (1880).

## 3. Reasons for change.

There is no constitutional right to have a jury mirror any particular community; thus, a capital murder defendant, who was granted a change of venue because of pretrial publicity, was not improperly denied a second change of venue to a county in which the racial makeup more closely reflected that of the county where the crime occurred where the jury that tried the defendant was selected in a nondiscriminatory manner, and there was no evidence that the jurors were not impartial. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court did not err in refusing to grant a change of venue when 54 out of the 106 persons in the venire had either discussed the case, read about it in the newspaper or had other knowledge concerning the case; the percentage of venire persons who have heard of the case is not, in and of itself, indicative of the need for a change of venue. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

Change of venue requested by defendant ordinarily should be granted in capital case where, under totality of circumstances, it appears reasonably likely that, in absence of such relief, defendant may lose his right to fair trial. *Foster v. State*, 508 So. 2d 1111 (Miss. 1987).

A record showing that the defendant charged with rape was black and the victim was white, that a series of rapes had occurred in the community, that there was a supposition that defendant was guilty of other crimes, and that there had been extensive local media coverage, did not give rise to an irrebutable presumption



that defendant could get a fair trial in the county where the offense was charged to have occurred, and, since the unfair trial presumption was rebuttable, the trial court did not err in overruling defendants' motion for change of venue, where the state had met its burden in rebutting the presumption. *White v. State*, 495 So. 2d 1346 (Miss. 1986).

Trial judge did not abuse his discretion in overruling homicide defendant's motion for change of venue, where there was no over-saturated media coverage, and, with one exception, newscast's and articles were typical and objective, and, since record did not contain the voir dire of prospective juror, it must be assumed that jurors who were seated had stated that they could give defendant a fair trial. *Weeks v. State*, 493 So. 2d 1280 (Miss. 1986).

The trial court's refusal in a capital murder prosecution to grant another change of venue from Harrison County did not deprive defendant of the right to have his case fairly and impartially tried and uninfluenced by the preponderant sentiment of the community, even though the trial court might better have moved the trial further away from Hancock County, where the reasons given for the move to Harrison County were that it had a continuous court term as opposed to the ten-week term in Hancock County, and that it would be more possible to select twelve jurors from the larger Harrison County. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

A motion for a change of venue, rather than a motion for continuance, is the usual procedure where an accused fears that he will be unable to get an impartial jury because of prejudicial pretrial publicity. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368 (Miss. 1969).

It is not necessary, in order for a defendant to be entitled to a change of venue, that it shall appear that every otherwise qualified juror in the county where the offense is charged to have been committed has prejudged the defendant's case or bears a grudge or ill will against him, and the defendant should not be denied a change of venue, although it may appear that twelve unbiased men may be found in the county to try him. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Motion for change of venue properly denied where evidence showed that a fair proportion of the people qualified for jury service in the county where qualified to try defendant's case fairly and impartially and that there was no preponderant sentiment in the county against him. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Motion for change of venue in criminal case is properly overruled when state shows by testimony of county officers and citizens from different parts of county that there is no aroused popular feeling against defendant, no public sentiment against him and that he can get a fair trial in county. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

A change of venue should be granted only for reasons given in this section [Code 1942, § 2508]. *Long v. State*, 133 Miss. 33, 96 So. 740 (1923).

It is not necessary for the accused to show that every otherwise qualified juror in the county was prejudiced against him in order that he may be entitled to a change of venue. *Keeton v. State*, 132 Miss. 732, 96 So. 179 (1923).

It is not error to refuse a change of venue where the record shows a fair and impartial trial. *Walden v. State*, 129 Miss. 686, 92 So. 820 (1922).

A change of venue should be granted where the evidence shows that a fair and impartial trial cannot be had. *Anderson v. State*, 92 Miss. 656, 46 So. 65 (1908); *Eddins v. State*, 110 Miss. 780, 70 So. 898 (1916).

#### 4. Review.

Denial of defendant's motion for a change of venue in his criminal trial was appropriate because defendant had ample opportunity to question members of the



venire and to use both his peremptory challenges and challenges for cause. *Conner v. State*, — So. 2d —, 2007 Miss. App. LEXIS 370 (Miss. Ct. App. May 29, 2007).

If state shows impartial jury was impaneled, Supreme Court defers to trial court's denial of change of venue request, even in face of adverse publicity, for venue decision is within discretion of lower court. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. *Hickson v. State*, 707 So. 2d 536 (Miss. 1997).

Supreme Court reviews trial court's ruling on motion to change venue in criminal proceeding under an abuse of discretion standard. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

When defendant alleges that he cannot obtain impartial jury without change of venue, lower court's decision to deny such motion is within trial judge's sound discretion; decision of lower court will not be overturned if that discretion has not been abused. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

Denial of defendant's motion for change of venue was not abuse of discretion, where upon questioning, during voir dire, some of prospective jurors stated that they had heard about the case, but none stated that they had heard, read or otherwise acquired knowledge of the case that would affect how he or she might view the evidence. *Cabello v. State*, 490 So. 2d 852 (Miss. 1986).

Where the entire record in a murder case, viewed from its conclusion and as an entirety, showed that the defendant has had a fair and impartial trial, free from bias and prejudice, the defendant has no right to complain because he was denied a change of venue. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957).

Granting of change of venue is so largely in discretion of trial court that a judgment or conviction will not be reversed on appeal, on ground that a change of venue was refused, unless it clearly appears that the trial court abused its discretion. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

In determining whether trial court abused its discretion in denying motion

for change of venue, supreme court will consider the voir dire examination of prospective jurors, the result of the effort to obtain a trial jury, and the evidence on the merits of the case. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

In testing the fairness or bias of the jurors to determine whether trial court abused its discretion in denying motion for change of venue, supreme court may look to the verdict reached viewed in the light of the evidence on the merits as a completed trial. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

The supreme court will review all the evidence where refusal to grant change of venue is properly assigned. *Bond v. State*, 128 Miss. 792, 91 So. 461 (1922).

Unless there has been an abuse of discretion by the circuit court, the supreme court will not reverse for a refusal to grant a change of venue. *Stewart v. State*, 50 Miss. 587 (1874); *Bishop v. State*, 62 Miss. 289 (1884); *Regan v. State*, 87 Miss. 422, 39 So. 1002 (1905); *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

### 5. Particular circumstances.

Defendant's motion for a change of venue was not in writing, was not supported by the affidavits of two or more credible persons, and was therefore procedurally barred under Miss. Code Ann. § 99-15-35; in addition, the trial court found that the allegations of judicial bias were unfounded, that the sheriff's department had not been uncooperative, that third-hand evidence of threats against one of defendant's witnesses was inadmissible hearsay, and that the jury had affirmed during voir dire testimony that media coverage of defendant's trial would not affect their impartiality. *Mingo v. State*, 944 So. 2d 18 (Miss. 2006).

In a capital murder case, the trial court did not err in not granting defendant a change of venue where no motion for change of venue appeared in the record, defendant failed to demonstrate that she was prejudiced by the denial of her "motion," and there was no evidence demonstrating that the failure to move the trial to another county was prejudicial to defendant. *Byrom v. State*, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

As the State produced evidence that a fair and impartial jury was actually selected, the venire members having not responded to inquiries from the trial court as to whether they had heard or read anything about the case that would prevent them from being fair and impartial, defendant did not meet his burden of showing that the trial judge abused his discretion when he overruled defendant's motion for change of venue. *Nichols v. State*, 868 So. 2d 355 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

The trial court did not err in denying the defendant's motion for a change of venue since, while a number of jurors had "heard" of the case, none of the responses to the voir dire questions showed any bias or prejudice toward the defendant's innocence or guilt and nothing in the record evinced any passion or outrage toward the defendant. *Gulley v. State*, 779 So. 2d 1140 (Miss. Ct. App. 2001).

In a murder prosecution, the court did not err when it first transferred venue to another county and then amended the order to transfer venue only for the limited purpose of selecting jurors, retaining the actual trial of the matter for reasons of practicality. *Brown v. State*, 749 So. 2d 82 (Miss. 1999).

The judge did not abuse his discretion in selecting the county for the defendant's murder prosecution and the defendant was not entitled to a change of venue where (1) coverage of the defendant's crime in the chosen county was much less extensive than in other areas of the state, and (2) although some jurors read newspaper articles about the trial, all stated that they could be fair and impartial. *Evans v. State*, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Trial court had authority, in highly publicized prosecution for murder of black leader of civil rights organization, to transfer venue for trial purposes to county which had more accommodating facilities and large law enforcement contingent to provide proper security. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant failed to properly support his motion to change venue, where defendant did not provide trial court with any affidavits swearing that he could not receive fair and impartial trial. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

By attaching to motion for change of venue five form affidavits indicating that affiants thought that defendant could not get fair trial in county due to ill will toward defendant, defendant successfully raised rebuttable presumption to demonstrate that impartial jury could not be impaneled. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

Murder defendant was not entitled to change of venue; none of the 12 jurors who served on defendant's case indicated that they had read about defendant's case or formed opinion one way or the other about his innocence vel non, witnesses in hearing on motion for change of venue, save one, testified that there had not been a lot of discussion about case, and all save one indicated that they were aware of no ill will or malice harbored by residents of county toward defendant. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

A trial court did not abuse its discretion in denying a defendant's motion for change of venue, which was primarily based on extensive publicity prior to trial, even though evidence otherwise inadmissible was contained in published reports of the crime and the victim was a prominent person in the county, where the state presented 11 witnesses who testified that they were familiar with the county and its residents, that there was no prejudice against the defendant, and that in their opinions the defendant could receive a fair trial, while the defendant presented one witness who testified on cross-examination that he felt the publicity had not so saturated the community that the defendant could not receive a fair trial, and presented 2 other witnesses, who were related to the defendant by marriage, who testified that the defendant could not obtain a fair trial but did not testify to familiarity with the county and its residents. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

Publicity associating a defendant with 3 robberies and 3 rapes was insufficient to



entitle him to a change of venue for his trial for rape where the publicity consisted of 4 newspaper articles, 3 of which appeared on the front page, and 6 months of silence intervened between the publicity and the trial. *McKinney v. State*, 521 So. 2d 898 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990).

A defendant waived his right to a change of venue where he filed a motion for change of venue with 2 supporting affidavits prior to selection of the jury but did not call the motion to the trial court's attention and did not request a hearing on the motion until after completion of voir dire, after selection of the jury, and after both sides had announced their readiness for trial. *Wash v. State*, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, *Wharton v. State*, 734 So. 2d 985 (Miss. 1998).

Trial court did not commit error in refusing to grant defendant's motion for change of venue where motion was filed along with 4 affidavits stating that defendant could not obtain fair trial in county, because at hearing on motion, 4 witnesses testified they had heard some talk about case, one admitted he had not heard anything for a month or two, 5 witnesses testified for state and 4 of them testified they had spoken to hundreds of people throughout county and had heard no expressions about case one way or other, and fifth, editor of newspaper, testified that newspaper publicity on case amounted to short piece in one edition and short paragraph in another. *Burney v. State*, 515 So. 2d 1154 (Miss. 1987), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

It was not error for Circuit Court to refuse to order change of venue despite testimony by county tax assessor admitting that rape of 76-year-old white female by 24-year-old black male could well be type of case that would subject accused to unfair trial by partial jury, and testimony of newspaper owner and editor that such crime would be volatile sort of thing that people would have strong feelings about. *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

Where sixty-five per cent of jurors examined to try defendant accused of mur-

der say that they either have fixed opinions which cannot be changed by evidence or that they are so biased or prejudiced against him that they cannot give him a fair trial, it is impossible for accused to obtain fair and impartial trial in county and motion for change of venue should be granted. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61 (1950).

Denial of motions for change of venue in homicide prosecution were without prejudice to accused where testimony of witnesses from all parts of county supported contention that accused could get a fair and impartial trial, and no special precautions were needed or taken; and fact that seven out of the first twenty-one jurors called were disqualified because of fixed opinions did not imply any purpose inconsistent with a guaranty of a fair and unbiased jury, particularly in view of the fact that defendant only exercised eight of his twelve peremptory challenges. *Patton v. State*, 207 Miss. 120, 40 So. 2d 592 (1949), error overruled, 207 Miss. 134, 41 So. 2d 55 (1949), appeal dismissed, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523 (1949).

Request for change of venue held properly denied within discretion of court at third trial of defendant for rape some two and one-half years after alleged offense where defendant's safety was not in jeopardy and many witnesses testified a fair trial could be had notwithstanding at the time of alleged offense state militia was called to protect the defendant. *McGee v. State*, 40 So. 2d 160 (Miss. 1949), appeal dismissed, cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950).

A prima facie case for change of venue is made out where it is shown that the public is so aroused against the accused that it was necessary to call out the militia or otherwise protect him from violence or to remove him from the county. *McGee v. State*, 200 Miss. 350, 26 So. 2d 680 (1946).

Trial court did not abuse its discretion in denying motion for change of venue in prosecution for murder of popular former sheriff, wherein defendants, who were from out of state, were convicted and death sentence imposed, in view of the



effort to obtain an unbiased jury and the evidence on the merits of the case, and where twelve citizens of the county testified positively that they knew of no reason why an unbiased jury could not be secured and a fair trial had, notwithstanding that defendants' counsel made charges, supported by affidavits, that they had talked with a number of citizens of the county and the feeling was general that defendants were guilty and should receive the death sentence. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

Where one is indicted in the same county for two offenses and is entitled to a change of venue for one under this section [Code 1942, § 2508], he should be granted a change as to the other, if the connection between the offenses is such that the prejudgment, grudge or ill will which entitled him to the change granted in one operates adversely to him in the other case although the crime charged in the other case did not produce such prejudgment. *Owens v. State*, 82 Miss. 31, 33 So. 722 (1903).

Instances of improper refusal of application for change of venue. *Tennison v. State*, 79 Miss. 708, 31 So. 421 (1901); *Brown v. State*, 83 Miss. 645, 36 So. 73 (1904); *Magness v. State*, 103 Miss. 30, 60 So. 8 (1912).

### 6. Publicity.

Of the articles submitted by defendant, where only three articles dated from 1998 identified the race of defendant, but none of which identified the race of the victim, the articles did not constitute an inordinate amount of media coverage; also, no venire member responded to the trial court's question that he or she had read, heard, or seen anything regarding the case, and thus the trial court did not abuse its discretion in denying defendant's motion for a change of venue. *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

In light of the scant amount of media coverage combined with the defendant's failure to submit the requisite affidavits of two or more credible persons as support for his motion for change of venue until the day of trial and after the jury pool had been called and seated, the evidence did not cast a cloud upon the defendant's right

to a fair trial before an impartial jury. *Conner v. State*, 726 So. 2d 1238 (Miss. Ct. App. 1998).

Pretrial publicity about sexual battery of church secretary in pastor's office of church in small town entitled defendant to change of venue, even though jurors stated that they could be fair and impartial; 11 jurors had read or watched media coverage of case, that coverage recounted another sexual battery charge against defendant, juror asked about this incident in deliberations, scientific evidence did not conclusively show guilt for rape, and case turned on credibility of witnesses. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. *Hickson v. State*, 707 So. 2d 536 (Miss. 1997).

Denial of defendant's motion for change of venue for resentencing in capital case was not abuse of discretion; there had been period of several years without newspaper or television coverage of case, and of six venirepersons who stated they had prior knowledge of case, those who stated their knowledge would affect verdict were removed and those two who remained stated their knowledge would not bar them from serving impartially. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Two factors are evaluated in determining whether trial court abused its discretion in denying motion to change venue in criminal proceeding; level of adverse publicity, both in extent of coverage and its inflammatory nature, and the extent of the effect the publicity had upon venire persons in case. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

### 7. Fair trial.

Petitioner was denied post-conviction relief from her capital murder conviction and death sentence based on her claim of ineffective assistance of counsel due to her counsel's failure to actively pursue a change of venue, because the court had considered the issue of counsel's pursuit of a change of venue on direct appeal and found no motion for change of venue in the record; there was no indication that such a motion had been presented to the trial

judge or ruled on, and there was no evidence in the record, nor was it demonstrated by petitioner in her brief, that the failure to move her trial to another county was prejudicial to her case. Although petitioner's claim was procedurally barred, the court considered the issue and found that petitioner failed to make a satisfactory showing that she did not receive a fair and impartial trial in the county where the offense was charged as required by Miss. Code Ann. § 99-15-35; the trial judge took steps, suggested and condoned by petitioner's counsel, to preserve the jury's impartiality. *Byrom v. State*, 927 So. 2d 709 (Miss. 2006).

Defendant failed to show that his trial counsel's performance was deficient on the issue of seeking a change of venue of his capital murder trial, pursuant to Miss. Code Ann. § 99-15-35, as no one in the community agreed to sign an affidavit to support the change of venue motion, four newspaper articles had been entered into evidence, of 10 witnesses who were randomly selected from the jury pool, nine indicated that they felt that defendant would get a fair trial in the present county, and defendant did not offer any proof that there was available evidence or testimony not admitted by defense counsel during the hearing. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Where defendant presents court with application for change of venue accompanied by two affidavits which affirm defendant's inability to receive fair trial in particular location, presumption is created that it is impossible for fair trial in that place. (Per Justice Banks with the Chief Justice, a presiding Justice, and one

Justice concurring and one presiding Justice concurring in result. *Hickson v. State*, 707 So. 2d 536 (Miss. 1997).

Presumption that defendant cannot receive fair trial, but needs change of venue, may be rebutted if state proves from voir dire that trial court impaneled impartial jury. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. *Hickson v. State*, 707 So. 2d 536 (Miss. 1997).

Presumption of inability to conduct fair trial in a venue arises with an application for change of venue supported by two affidavits affirming defendant's inability to receive fair trial. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

State can rebut presumption of inability to conduct fair trial in original venue by proving from voir dire that trial court impaneled an impartial jury; if state demonstrates such, Supreme Court will not overturn trial court's finding that an impartial jury could be found, despite adverse publicity. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

## 8. Discretion.

Although venue issue is committed to trial judge's sound discretion, it is not left up to his unfettered discretion; the discretion must be informed by evidence presented at venue hearing coupled with trial judge's reasoned application of sense of community and awareness of impact of saturation media publicity upon attitudes of community. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. *Hickson v. State*, 707 So. 2d 536 (Miss. 1997).

## RESEARCH REFERENCES

**ALR.** Right of prosecution to writ of *habeas corpus* in criminal case. 91 A.L.R.2d 1095.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 A.L.R.3d 804.

Change of venue by state in criminal case. 46 A.L.R.3d 295.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes. 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert,

or similar nonmedical specialist in substance analysis. 74 A.L.R.4th 388.

Power of state trial court in criminal case to change venue on its own motion. 74 A.L.R.4th 1023.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 517 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 151 et seq. (venue).

1 Am. Jur. Trials, Controlling Trial Publicity, § 32.

**CJS.** 22 C.J.S., Criminal Law §§ 239 et seq.

## § 99-15-37. Change of venue; transfer of records to removal court.

Upon the order being made changing the venue in a criminal case, the clerk shall make out a transcript of the caption of the record, also of the proceedings impaneling the grand jury, of the indictment, with the entries or indorsements thereon, and all entries relative thereto in the records of his office, of the bonds and recognizances of the defendant, of the names of all the witnesses, and of all orders, judgments, or other papers or proceedings belonging to or had in said cause and attach his certificate thereto, under his hand, with the seal of the court annexed, and forward it, sealed up, by a special messenger, or deliver it himself, together with all the original subpoenas in the case, to the clerk of the circuit court to which the trial is ordered to be removed.

**SOURCES:** Codes, 1857, ch. 64, art. 299; 1871, § 2763; 1880, § 2062; 1892, § 1412; Laws, 1906, § 1485; Hemingway's 1917, § 1243; Laws, 1930, § 1266; Laws, 1942, § 2509.

**Cross References** — On change of venue, defendant to be tried on copy of indictment, see § 99-15-39.

Correcting errors in the record, see § 99-15-41.

Change of venue in capital cases, see § 99-15-43.

Severance of joint indictments in felony cases, see § 99-15-47.

## JUDICIAL DECISIONS

### 1. In general.

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of § 99-15-41. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d

1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

The presumption that the clerk of the circuit court where the original indictment was found did his duty under this section [Code 1942, § 2509] is not overcome by the testimony of the clerk of the circuit court to which the venue is changed that he had received the transcript by mail. *McDonald v. State*, 78 Miss. 369, 29 So. 171 (1901).



## RESEARCH REFERENCES

**ALR.** Power or duty of prosecuting attorney to proceed with prosecution after change of venue. 60 A.L.R.2d 864.

Binding effect of order on motion for

change of venue, where action is terminated otherwise than on merits and reinstituted. 85 A.L.R.2d 993.

**§ 99-15-39. Change of venue; defendant to be tried on copy of indictment; specific objections to defects in transcript required.**

The defendant, on a change of venue, shall be tried on the copy of the indictment so certified; and the record, proceedings, and papers therein copied and certified, shall, in all respects become, be received, read, and taken as the original record, papers and proceedings in the said cause, and shall have the same force and effect. Defects in the transcript shall not avail the accused if he do not object to them specifically before trial.

**SOURCES:** Codes, 1857, ch. 64, art. 300; 1871, § 2764; 1880, § 3063; 1892, § 1413; Laws, 1906, § 1586; Hemingway's 1917, § 1244; Laws, 1930, § 1267; Laws, 1942, § 2510.

**Cross References** — Transfer of records to removal court, see § 99-15-37.

Correcting errors in the record, see § 99-15-41.

## JUDICIAL DECISIONS

**1. In general.**

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of § 99-15-41. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

The copy of the indictment transmitted must show the indorsement of "filed," which is made by statute evidence of its finding and return. *Williamson v. State*, 64 Miss. 229, 1 So. 171 (1887).

The court to which the venue is changed must try the accused not on the original indictment but upon a certified copy. *Browning v. State*, 30 Miss. 656 (1856); *Browning v. State*, 33 Miss. 47 (1856); *Williamson v. State*, 64 Miss. 229, 1 So. 171 (1886).

The record transmitted must appear to be a record of the proceedings upon the indictment on which the prisoner is tried. *Jenkins v. State*, 30 Miss. 408 (1855).

**§ 99-15-41. Change of venue; correcting errors in record.**

On suggestion to the court, with satisfactory showing, it may order a more perfect record to be made and certified, or direct the clerk making the same to rectify any errors therein.

**SOURCES:** Codes, 1857, ch. 64, art. 301; 1871, ch. 2765; 1880, § 3064; 1892, § 1414; Laws, 1906, § 1487; Hemingway's 1917, § 1245; Laws, 1930, § 1268; Laws, 1942, § 2511.

## JUDICIAL DECISIONS

### 1. In general.

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of this section. *Hansen v. State*,

592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

### § 99-15-43. Change of venue; capital cases.

In capital cases the application for change of venue must be made before the drawing of any special venire which is summoned to appear on the day the case is set for trial, or it will be too late, except where the ground on which such application is based occurred after the drawing of such venire.

**SOURCES:** Codes, 1880, § 3065; 1892, § 1415; Laws, 1906, § 1488; Hemingway's 1917, § 1246; Laws, 1930, § 1269; Laws, 1942, § 2512; Laws, 1985, ch. 443, § 4, eff from and after July 1, 1985.

**Cross References** — Showing of need and grounds for change of venue generally, see § 99-15-35.

Severance of joint indictments in felony cases, see § 99-15-47.

## JUDICIAL DECISIONS

### 1. In general.

In the trial of a capital murder charge, there was no error in denial of a change of venue where the trial judge found after voir dire of the jury that the panel represented a cross-section of the county and that, based upon the prospective jurors' responses, a fair jury could be drawn. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

In a murder prosecution, the court properly overruled defendant's motion for a change of venue, which was made after the special venire had been summoned and while the jury was being impaneled to try the defendant, and which was not supported by the affidavits of two or more credible persons. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957).

Under this section [Code 1942, § 2512] an application for a change of venue is not too late if it is made after the quash of the venire but before the writ of another is issued. *Purvis v. State*, 71 Miss. 706, 14 So. 268 (1894).

## RESEARCH REFERENCES

**ALR.** Power of state trial court in criminal case to change venue on its own motion. 74 A.L.R.4th 1023.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

### § 99-15-45. Change of venue; costs paid by county from which venue is changed.

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

**SOURCES:** Codes, 1880, § 3066; 1892, § 1416; Laws, 1906, § 1489; Hemingway's 1917, § 1247; Laws, 1930, § 1270; Laws, 1942, § 2513.

### § 99-15-47. Joint indictments; severance in felonies.

Any of several persons jointly indicted for a felony may be tried separately on making application therefor, in capital cases, before the drawing of any special venire which is summoned to appear on the day the case is set for trial and in other cases, before arraignment.

**SOURCES:** Codes, 1880, § 3068; 1892, § 1417; Laws, 1906, § 1490; Hemingway's 1917, § 1248; Laws, 1930, § 1271; Laws, 1942, § 2514, Laws, 1985, ch. 443, § 5, eff from and after July 1, 1985.

**Cross References** — Change of venue in capital cases, see § 99-15-43.

Severance of joint indictments in misdemeanors, see § 99-15-49.

Joint defendants, tried separately, are competent witnesses for one another, see § 99-17-17.

Arraignment of defendants who are jointly charged, see Miss. Unif. Cir. & County Ct. Prac. R. 8.01.

Severance of offenses and defendants, see Miss. Unif. Cir. & County Ct. Prac. R. 9.03.

Joint indictments, see Miss. Unif. Cir. & County Ct. Prac. R. 7.08.

## JUDICIAL DECISIONS

1. In general.
2. When made.

#### 1. In general.

Trial court's refusal to sever defendants was not an abuse of discretion, as there was no showing either defendant was prejudiced by the denial of the severance: neither sought exculpation at the expense of the other; the evidence, except as to a bite mark that implicated the first defendant, went to the guilt of both defendants; and other evidence did not exclude the second defendant from causing any of the

victim's other injuries. *Stubbs v. State*, 845 So. 2d 656 (Miss. 2003).

The statute does not require that persons jointly indicted for capital murder, where the state intends to seek the death penalty, must be tried separately. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

Nothing in the statute requires that persons jointly indicted for capital murder, where the state intends to seek the death penalty, must be tried separately; the statute only provides that co-indictees



may be tried separately, at the trial court's discretion, when a motion for severance is timely filed. *Smith v. State*, 724 So. 2d 280 (Miss. 1998).

A trial court erred in refusing to grant a defendant's request for a severance where the evidence offered by the State implicated both the defendant and the codefendant equally in the commission of the crime, and the testimony of both of them tended to exculpate themselves at the expense of the other; if a severance had been granted, the jury would have been able to consider the defendant's defense in light of the State's evidence without first comparing it to the codefendant's defense to make sure the defenses were consistent, and a separate trial would ensure that the defendant was convicted solely on the basis of the State's evidence and not because he and the codefendant had inconsistent defenses. *Tillman v. State*, 606 So. 2d 1103 (Miss. 1992).

Whether or not 2 defendants' statements given to officers were in conflict is not the test in deciding whether an attorney has a conflict of interest in representing the 2 defendants. The test is whether their defenses are in conflict with each other. This is important in determining both whether their trials should be severed and whether or not the attorney is placed in an unethical position in having to represent them both. *Carol v. State*, 540 So. 2d 1330 (Miss. 1989).

The criteria to be used to determine if the denial of a motion for severance is proper are whether or not the testimony of one co-defendant tends to exculpate him or herself at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. *Hawkins v. State*, 538 So. 2d 1204 (Miss. 1989).

Where the testimony of co-defendants is adverse, it is reversible error for the circuit judge to overrule a motion for severance, timely made. *Rigby v. State*, 485 So. 2d 1060 (Miss. 1986).

A directed verdict of acquittal as to other co-defendants dissipated harm to the remaining defendant resulting from judge's error in refusing to grant severance. *Rigby v. State*, 485 So. 2d 1060 (Miss. 1986).

Trial court may refuse to grant motion for severance filed by defendant in prosecution for robbery with deadly weapon where there does not appear to be conflict of interest among codefendant and evidence introduced at trial does not go more to guilt of one defendant than to other. *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985).

In prosecution of the parents for the capital murder of their child, the trial court did not abuse its discretion in denying the defendants' motion for severance made pursuant to this section. *Cardwell v. State*, 461 So. 2d 754 (Miss. 1984).

Whether a severance should be granted pursuant to this section is addressed to the discretion of the trial judge. *Price v. State*, 336 So. 2d 1311 (Miss. 1976).

Since a right to a separate trial does not give defendants a corresponding right to be tried jointly, and the court in its discretion may order separate trials over an objection that defendants should be tried together, the trial court did not err in trying separately a defendant who had been jointly indicted with another for murder. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957).

In the prosecution of several defendants for grand larceny of tung nuts, although the defendants had a right to severance by applying for it before arraignment, under this section [Code 1942, § 2514] the granting of severance was discretionary with the trial court where application was made after the arraignment. *Dueitt v. State*, 225 Miss. 254, 83 So. 2d 91 (1955).

In case where several defendants jointly indicted are granted a severance but are thereafter tried jointly on the indictment without objection on their part they waive their right to a separate trial. *Wellborn v. State*, 140 Miss. 640, 105 So. 769 (1925).

This section [Code 1942, § 2514], if severance be seasonably applied for, does not otherwise change the common law. *Malone v. State*, 77 Miss. 812, 26 So. 968 (1900).

## 2. When made.

It was within the trial court's discretion as to whether severance should be granted where the record did not indicate that the right to move for severance had

been reserved prior to arraignment. *Rooks v. State*, 529 So. 2d 546 (Miss. 1988).

Sustaining a motion for severance, even though it is timely made, is ordinarily discretionary with the circuit judge in all criminal trials, except death penalty cases. *Rigby v. State*, 485 So. 2d 1060 (Miss. 1986).

Motion for severance which is not brought to court's attention before state has announced ready for trial on date set for trial is properly denied. *Minor v. State*, 482 So. 2d 1107 (Miss. 1986).

In a prosecution for armed robbery the trial court did not abuse its discretion in denying defendant's motion for a severance during the middle of the trial, where defendant's attorney testified that he elected to have codefendants tried together as part of his trial strategy despite his pretrial knowledge of the potential conflict of interest between the codefendants. *Hicks v. State*, 419 So. 2d 215 (Miss. 1982).

In a prosecution for burglary in which defendants were jointly tried and convicted, the trial court did not err in over-

ruling defendants' motion for severance where the motion, made over four months after trial and one month after the trial record was filed in the Supreme Court, was patently untimely. *Usry v. State*, 378 So. 2d 635 (Miss. 1979).

It was within the discretion of the trial court to refuse to grant a motion for severance by defendant jointly indicated for burglary, and it did not abuse that discretion in denying defendant's motion, which was not filed until one day before the case was set for trial. *Ivory v. State*, 336 So. 2d 732 (Miss. 1976).

Where an application for severance is made after arraignment of defendant, charged with assault and battery with intent to kill, the granting of a severance is discretionary with the trial court. *Bolin v. State*, 209 Miss. 866, 48 So. 2d 581 (1950).

Assignment of error cannot be considered on bills of exception signed and filed five months after trial and two months after record filed in supreme court, where failure to grant a severance is complained of. *Davis v. State*, 144 Miss. 551, 110 So. 447 (1926).

## RESEARCH REFERENCES

**ALR.** Right to severance where codefendant has incriminated himself. 54 A.L.R.2d 830.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Rights of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

75 Am. Jur. 2d, Trial §§ 17 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 321, 322 (severance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 53 et seq.

**CJS.** 23 C.J.S., Criminal Law §§ 804, 806.

42 C.J.S., Indictments and Informations §§ 142 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1983 Mississippi Supreme Court Review: Severance of joint trials. 54 Miss L. J. 139, March, 1984.

## § 99-15-49. Joint indictments; severance in misdemeanors.

Persons jointly indicted for misdemeanors may be tried jointly or separately, in the discretion of the court.

**SOURCES:** Codes, 1880, § 3069; 1892, § 1418; Laws, 1906, § 1491; Hemingway's 1917, § 1249; Laws, 1930, § 1272; Laws, 1942, § 2515.

**Cross References** — Severance of joint indictments in felony cases, see § 99-15-47. Severance of offenses and defendants, see Miss. Unif. Cir. & County Ct. Prac. R. 9.03. Joint indictments, see Miss. Unif. Cir. & County Ct. Prac. R. 7.08.

## JUDICIAL DECISIONS

### 1. In general.

Supreme court would not interfere with trial court's discretion in overruling motion for severance made by seven defen-

dants charged with being interested in gambling table. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

## RESEARCH REFERENCES

**ALR.** Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Rights of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

75 Am. Jur. 2d, Trial §§ 17 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 321, 322 (severance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 53 et seq.

**CJS.** 23 C.J.S., Criminal Law §§ 804, 806 et seq.

42 C.J.S., Indictments and Informations §§ 142 et seq.

## § 99-15-51. Dismissal of petty misdemeanor charge upon satisfaction of injured party.

In prosecutions for petty misdemeanors, if the party injured appear before the court where the same shall be pending and acknowledge to have received satisfaction, on motion of the prosecuting attorney the court, if it shall adjudge that the ends of justice will be conserved thereby, may discharge the defendant and dismiss the proceedings and may require the payment of court costs.

**SOURCES:** Codes, 1857, ch. 64, art. 360; 1871, § 2868; 1880, § 3102; 1892, § 1457; Laws, 1906, § 1530; Hemingway's 1917, § 1292; Laws, 1930, § 1317; Laws, 1942, § 2565; Laws, 1988, ch. 415, § 1; Laws, 1990, ch. 316, § 1, eff from and after July 1, 1990.

**Cross References** — Trial where it appears accused is only guilty of misdemeanor, see § 99-15-55.

Expunction of misdemeanor charges, see § 99-15-59.

Plea discussions, see Miss. Unif. Cir. & County Ct. Prac. R. 8.04.

## JUDICIAL DECISIONS

### 1. In general.

In a suit for damages on a charge of malicious prosecution, the question as to whether the plaintiff had authorized or subsequently ratified another person's

compromise and settlement of the prosecution, while the plaintiff was in jail, was for the jury. *Brown v. Kisner*, 192 Miss. 746, 6 So. 2d 611 (1942).



## ATTORNEY GENERAL OPINIONS

"Remanded to the File" is not a statutory disposition of a case, and since this is not a statutory dismissal, no costs should be imposed against the defendant. Reed, Nov. 13, 1991, A.G. Op. #91-0776.

Court may dismiss prosecution of misdemeanor on motion of prosecuting attorney. Cooke, Dec. 17, 1992, A.G. Op. #92-0858.

Misdemeanor affidavit, including traffic ticket, can only be dismissed in accordance with Miss. Code Section 99-15-51 which provides that court may dismiss prosecution of misdemeanor on motion of prosecuting attorney. Miller, Mar. 3, 1993, A.G. Op. #93-0099.

A defendant may be required to pay court cost for a petty misdemeanor case that is dismissed at the request of the victim; however, a defendant charged with a felony may not be required to pay the court costs upon dismissal of the charge. Pacific, November 25, 1998, A.G. Op. #98-0718.

There is no authority for a justice court to charge a "drop fee" for a case to be dismissed; however, costs under the statute should be charged against the defendant. Barnett, May 19, 2000, A.G. Op. #2000-0272.

## RESEARCH REFERENCES

**ALR.** Construction and effect of statute authorizing dismissal of criminal action

upon settlement of civil liability growing out of act charged. 42 A.L.R.3d 315.

**§ 99-15-53. Prosecutions not compromised or nol prossed without consent of court, or dismissed, except at defendant's cost.**

A district attorney, or other prosecuting attorney, shall not compromise any cause or enter a nolle prosequi either before or after indictment found, without the consent of the court; and, except as provided in the last preceding section, it shall not be lawful for any court to dismiss a criminal prosecution at the cost of the defendant, but every cause must be tried unless dismissed by consent of the court.

**SOURCES:** Codes, 1857, ch. 64, art. 367; 1871, § 2872; 1880, § 3103; 1892, § 1458; Laws, 1906, § 1531; Hemingway's 1917, § 1293; Laws, 1930, § 1318; Laws, 1942, § 2566; Laws, 1988, ch. 415, § 2, eff from and after July 1, 1988.

## JUDICIAL DECISIONS

**1. In general.**

Trial court had no obligation to take into consideration offer made as part of a rejected plea bargain when sentencing defendant for manslaughter. Wade v. State, 802 So. 2d 1023 (Miss. 2001).

The trial court did not err in refusing to grant the state's motion to dismiss a prosecution for burglary of a dwelling where the state sought dismissal of the case based upon its perception of what evidence regarding drug possession and use

by the defendant would be allowed or disallowed; the trial court, having determined that the evidence would be allowed for a limited purpose, refused to dismiss the case. Potts v. State, 755 So. 2d 1196 (Miss. Ct. App. April 25, 2000).

Notwithstanding that the district attorney erred in failing to gain the judge's approval of a plea agreement that involved the nolle prosequi of two cases before her, once the defendants detrimentally relied on the agreement by pleading

guilty and testifying about their drug business at their plea hearing before another judge, the first judge abused her discretion by refusing to grant the state's motion to dismiss. *State v. Adams County Circuit Court*, 735 So. 2d 201 (Miss. 1999).

If the authority and approval of the circuit court are obtained, the prosecuting attorney may strike an enforceable agreement with a prospective witness that, if he or she will testify as a witness in any pending proceeding, he or she may be granted immunity from prosecution. *Wright v. McAdory*, 536 So. 2d 897 (Miss. 1988).

The consent of the court to a compromise of any criminal case is required by this section [Code 1942, § 2566]. *Moore v. State*, 242 So. 2d 414 (Miss. 1970).

Where the order of the court was a nolle prosequi the defendant may be reindicted, or he may be tried upon an indictment charging him with another offense actually committed but for which he was not tried. *State v. Thornhill*, 251 Miss. 718, 171 So. 2d 308 (1965).

In prosecution for larceny of a calf, the action of trial court in denying motion of district attorney for a nolle pros after all experts who had examined defendant found that he was suffering from mental or nervous disorder and was in need of treatment at a mental institution, was not error. *Shipp v. State*, 215 Miss. 541, 61 So. 2d 329 (1952), but see *Addikson v. State*, 608 So. 2d 304 (Miss. 1992).

### ATTORNEY GENERAL OPINIONS

If an affidavit and warrant is withdrawn by the District Attorney prior to docketing and prior to the matter proceeding past the basic signing of the document, this section would give the court the discretion to charge court costs against a

defendant. *Pacific*, March 24, 1995, A.G. Op. #95-0146.

Based on this section, a prosecutor may dismiss a D.U.I. charge only with consent of the court. *Lowrey*, July 19, 1996, A.G. Op. #96-0478.

### RESEARCH REFERENCES

**ALR.** Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 A.L.R.3d 281.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness. 4 A.L.R.4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution. 4 A.L.R.4th 1221.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached. 14 A.L.R.4th 1014.

When is federal court justified, under Rule 48(a) of the Federal Rules of Criminal Procedure, in denying government leave to dismiss criminal charges. 48 A.L.R. Fed. 635.

When is dismissal of indictment appropriate remedy for misconduct of government official. 57 A.L.R. Fed. 824.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 770 et seq.

**CJS.** 22A C.J.S., Criminal Law §§ 543-545 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 3:4.

## § 99-15-55. Trial where it appears that accused is only guilty of misdemeanor.

If, on the examination into the case of any person brought before a conservator of the peace other than a justice of the peace, on a charge of felony, it shall clearly appear that a felony has not been committed, but that the

accused is guilty of a misdemeanor of which a justice of the peace has jurisdiction, the conservator of the peace shall require the accused to be carried before the proper justice of the peace for trial. If the conservator of the peace in such case be a justice of the peace, having territorial jurisdiction of the offense he shall convict the offender and punish him accordingly, but such conviction shall not bar a subsequent prosecution for felony in the same matter.

**SOURCES:** Codes, 1880, § 3118; 1892, § 1465; Laws, 1906, § 1537; Hemingway's 1917, § 1299; Laws, 1930, § 1324; Laws, 1942, § 2572.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Dismissal of petty misdemeanor charge upon satisfaction of injured party, see § 99-15-51.

## JUDICIAL DECISIONS

### 1. In general.

Where an affidavit charging accused with simple assault has been filed in justice of the peace court and then an indictment was returned charging the accused with assault and battery with intent to kill before he was tried for simple assault, regardless of the outcome of the trial for a misdemeanor, it would be no bar to a subsequent indictment for felony in the same manner. *Chester v. State*, 216 Miss. 748, 63 So. 2d 99 (1953).

A justice of the peace of a different district than that in which an assault and battery is committed trying the case on the charge of assault and battery with intent to kill and murder has no jurisdic-

tion to try and convict of the lesser offense of assault and battery. *Ivy v. State*, 141 Miss. 877, 106 So. 111 (1925).

Under this section [Code 1942, § 2572] the accused has the right to be fully advised in the affidavit of the nature and cause of the crime charged. *Brown v. State*, 103 Miss. 664, 60 So. 727 (1913).

If one charged with a felony be convicted by the justice of a constituent misdemeanor and he appeal and on trial in the circuit court the verdict be "guilty as charged in the affidavit," the verdict will be limited to the charge in the affidavit of which the accused was convicted, the misdemeanor. *Hastings v. State*, 59 Miss. 541 (1882).

## ATTORNEY GENERAL OPINIONS

Under this section, at the conclusion of a preliminary hearing where the municipal judge finds no probable cause for a felony, but sufficient evidence to convict the accused of a misdemeanor, he should

bind the offender over to the justice court judge within proper jurisdiction to hear the case. See also Section 21-23-7. *Mitchell*, May 11, 1995, A.G. Op. #95-0182.

### § 99-15-57. Relief for certain persons who pled guilty within six months prior to the effective date of section 99-15-26.

(1) Any person who pled guilty within six (6) months prior to the effective date of Section 99-15-26, Mississippi Code of 1972, and who would have otherwise been eligible for the relief allowed in such section, may apply to the court in which such person was sentenced for an order to expunge from all official public records all recordation relating to his arrest, indictment, trial,



finding of guilty and sentence. If the court determines, after hearing, that such person has satisfactorily served his sentence or period of probation and parole, pled guilty within six (6) months prior to the effective date of Section 99-15-26 and would have otherwise been eligible for the relief allowed in such section, it may enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or trial in response to any inquiry made of him for any purpose.

(2) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

**SOURCES:** Laws, 1986, ch. 362; Laws, 1996, ch. 454, § 4; Laws, 2003, ch. 557, § 3, eff from and after passage (approved Apr. 24, 2003.)

## JUDICIAL DECISIONS

### 1. In general.

Request to be sentenced pursuant to Miss. Code Ann. § 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request; in defendant's case, the circuit court did not withhold acceptance of defendant's guilty plea; instead, it accepted defendant's guilty plea and adjudicated defendant accordingly, with defendant receiving a four year suspended sentence and five years of probation. Thus, the circuit court did not err in denying defendant's petition for expungement. *Turner v. State*, 876 So. 2d 1056 (Miss. Ct. App. 2004).

Trial court lacked jurisdiction to expunge defendant's criminal record because the trial court did not withhold acceptance of her guilty plea when defendant pled on September 23, 1996; the trial court sentenced defendant to regular probation; because defendant was not sentenced under Miss. Code Ann. § 99-15-26, her argument was without merit. *Smith v. State*, 869 So. 2d 425 (Miss. Ct. App. 2004).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungement of criminal offender records

in limited cases-youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungement of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of § 99-15-26 may apply to the court for an order expunging his or her criminal records. Under §§ 99-15-57 and 99-15-26 a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to §§ 99-15-57 and 99-15-26 if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the "within 6 months prior to" March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing

expungment, and thus the trial court did not err in denying his petition for

expungment. *Caldwell v. State*, 564 So. 2d 1371 (Miss. 1990).

### RESEARCH REFERENCES

**ALR.** State court's power to place defendant on probation without imposition of sentence. 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Construction, as to terms and conditions, of state statute or rule providing for

voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 A.L.R.4th 778.

Admissibility of evidence of other offense where record has been expunged or erased. 82 A.L.R.4th 913.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 901 et seq.

## § 99-15-59. Expunction of misdemeanor charges.

Any person who is arrested, issued a citation, or held for any misdemeanor and not formally charged or prosecuted with an offense within twelve (12) months of arrest, or upon dismissal of the charge, may apply to the court with jurisdiction over the matter for the charges to be expunged.

**SOURCES:** Laws, 1998, ch. 556, § 1, eff from and after July 1, 1998.

**Cross References** — Dismissal of petty misdemeanor charge upon satisfaction of injured party, see § 99-15-51.

### PRETRIAL INTERVENTION PROGRAM

SEC.	
99-15-101.	Citation of Sections 99-15-101 through 99-15-127.
99-15-103.	Definitions.
99-15-105.	Establishment of pretrial intervention program; role of district attorney; application.
99-15-107.	Ineligibility for intervention.
99-15-109.	Conditions when intervention is appropriate.
99-15-111.	Information required from offender prior to admittance into program.
99-15-113.	Recommendations of victim and law enforcement agency as to offender's admittance into program.
99-15-115.	Waiver and agreements required of offender who enters program.
99-15-117.	Agreement between district attorney and offender outlining terms of program; approval by court.
99-15-119.	Written reports retained for all offenders accepted into program; information furnished to Mississippi Justice Information Center.
99-15-121.	Restitution required prior to completion of program.
99-15-123.	Disposition of charges upon successful completion of program; violation of program agreement by offender.
99-15-125.	Law enforcement officer precluded from referring to program as inducement to any statement, confession or waiver by offender; exception.
99-15-127.	Department of Corrections, Division of Community Corrections to support program.

## § 99-15-101. Citation of Sections 99-15-101 through 99-15-127.

Sections 99-15-101 through 99-15-127 shall be known and may be cited as the "Pretrial Intervention Act."

**SOURCES:** Laws, 1983, ch. 445, § 1; reenacted without change, 1987, ch. 329, § 1, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

## JUDICIAL DECISIONS

### 1. Attorney discipline proceedings.

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former

requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect to the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. *Miss. Bar v. Cofer*, 904 So. 2d 97 (Miss. 2004).

## ATTORNEY GENERAL OPINIONS

An individual charged with an implied consent violation may be placed in a pretrial intervention program as specified by Sections 99-15-101 through 99-15-127. *Helfrich*, April 5, 1996, A.G. Op. #96-0193.

The Pretrial Intervention Act does not authorize a circuit court to use program funds to support a court-sponsored community service project. *Hedgepeth*, May 30, 2003, A.G. Op. 03-0165.

Neither the district attorney nor the circuit court has the authority to increase

pretrial intervention program fees to pay the cost of operating a court-sponsored community service project. *Hedgepeth*, May 30, 2003, A.G. Op. 03-0165.

A district attorney may not use funds intended to pay the expenses of a pretrial intervention program to pay the costs associated with a court-sponsored community service project. *Hedgepeth*, May 30, 2003, A.G. Op. 03-0165.

## RESEARCH REFERENCES

**ALR.** Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defen-

dant's consent to noncriminal alternative. 4 A.L.R.4th 147.



**§ 99-15-103. Definitions.**

For purposes of Sections 99-15-101 through 99-15-127, the following words shall have the meaning ascribed herein unless the context shall otherwise require:

(a) "Prosecutorial discretion" means the power of the district attorney to consider all circumstances of criminal proceedings and to determine whether any legal action is to be taken and, if so taken, of what kind and degree and to what conclusion.

(b) "Noncriminal disposition" means the dismissal of a criminal charge without prejudice to the state to reinstate criminal proceedings on motion of the district attorney.

**SOURCES:** Laws, 1983, ch. 445, § 2; reenacted, 1987, ch. 329, § 2, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

**§ 99-15-105. Establishment of pretrial intervention program; role of district attorney; application.**

(1) Each district attorney, with the consent of a circuit court judge of his district, shall have the prosecutorial discretion as defined herein and may as a matter of such prosecutorial discretion establish a pretrial intervention program in the circuit court districts.

(2) A pretrial intervention program shall be under the direct supervision and control of the district attorney.

(3) An offender must make application to an intervention program within the time prescribed by the district attorney.

**SOURCES:** Laws, 1983, ch. 445, § 3; reenacted, 1987, ch. 329, § 3, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

**RESEARCH REFERENCES**

**ALR.** Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defendant's consent to noncriminal alternative. 4 A.L.R.4th 147.

**§ 99-15-107. Ineligibility for intervention.**

A person shall not be considered for intervention if he or she has previously been accepted into an intervention program nor shall intervention be considered for those individuals charged with any crime of violence including, but not limited to murder, aggravated assault, rape, armed robbery, manslaughter or burglary of a dwelling house. A person shall not be eligible for acceptance into the intervention program provided by Sections 99-15-101 through 99-15-127 if such person has been charged (a) with an offense pertaining to the sale, barter, transfer, manufacture, distribution or dispensing of a controlled substance, or the possession with intent to sell, barter, transfer, manufacture, distribute or dispense a controlled substance, as provided in Section 41-29-139(a)(1), Mississippi Code of 1972, except for a charge under said provision when the controlled substance involved is one (1) ounce or less of marihuana; or (b) with an offense pertaining to the possession of one (1) kilogram or more of marihuana as provided in Section 41-29-139(c)(2)(D), Mississippi Code of 1972.

**SOURCES:** Laws, 1983, ch. 445, § 4; reenacted, 1987, ch. 329, § 4, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

It appears that the reference to "Section 41-29-139(c)(2)(D)" should now be to "Section 41-29-139(c)(2)(F) and (G)".

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Conditions when intervention is appropriate, see § 99-15-109.

**§ 99-15-109. Conditions when intervention is appropriate.**

(1) Intervention shall be appropriate only when:

- (a) The offender is eighteen (18) years of age or older;
  - (b) There is substantial likelihood that justice will be served if the offender is placed in an intervention program;
  - (c) It is determined that the needs of the offender and the state can better be met outside the traditional criminal justice process;
  - (d) It is apparent that the offender poses no threat to the community;
  - (e) It appears that the offender is unlikely to be involved in further criminal activity;
  - (f) The offender, in those cases where it is required, is likely to respond quickly to rehabilitative treatment;
  - (g) The offender has no significant history of prior delinquency or criminal activity;
  - (h) The offender has been indicted and is represented by an attorney;
- and

(i) The court has determined that the office of district attorney or the department of corrections has sufficient support staff to administer such intervention program.

(2) When jurisdiction in a case involving a child is acquired by the circuit court pursuant to a transfer from the youth court, the provision of subsection (1)(a) of this section shall not be applicable.

(3) Notwithstanding any other provision of this section, in all criminal cases wherein an offender has been held in contempt of court for failure to pay fines or restitution, the offender may be placed in pretrial intervention for the purpose of collecting unpaid restitution and fines regardless of any prior criminal conviction, whether felony or misdemeanor.

**SOURCES:** Laws, 1983, ch. 445, § 5; reenacted, 1987, ch. 329, § 5; Laws, 2006, ch. 453, § 1, eff from and after July 1, 2006.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Amendment Notes** — The 2006 amendment added (3).

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Ineligibility for intervention, see § 99-15-107.

Information required from offender prior to admittance into program, see § 99-15-111.

Recommendations of victim and law enforcement agency as to offender's admittance into program, see § 99-15-113.

Waiver and agreements required of offender who enters program, see § 99-15-115.

### ATTORNEY GENERAL OPINIONS

Provision of the the Pretrial Intervention Act that the offender has been indicted and is represented by an attorney would not apply to defendants charged

with misdemeanor offenses in justice or municipal courts. Bates, Apr. 2, 2004, A.G. Op. 04-0144.

### § 99-15-111. Information required from offender prior to admittance into program.

Prior to admittance of an offender into an intervention program, the district attorney may require the offender to furnish information concerning the offender's past criminal record, education and work record, family history, medical or psychiatric treatment or care received, psychological tests taken and other information which, in the district attorney's opinion, bears on the decision as to whether the offender should be admitted.

**SOURCES:** Laws, 1983, ch. 445, § 6; reenacted, 1987, ch. 329, § 6, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."



**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Agreement between district attorney and offender, terms of intervention, see § 99-15-117.

Restitution required prior to completion of program, see § 99-15-121.

Ineligibility for intervention, see § 99-15-107.

Conditions when intervention is appropriate, see § 99-15-109.

### **§ 99-15-113. Recommendations of victim and law enforcement agency as to offender's admittance into program.**

Prior to any person's admittance to a pretrial intervention program the victim, if any, of the crime for which the applicant is charged and the law enforcement agency employing the arresting officer shall be asked to comment in writing as to whether or not the applicant should be allowed to enter an intervention program. In each case involving admission to an intervention program, the district attorney and a circuit court judge of his district shall consider the recommendations of the law enforcement agency and the victim, if any, in making a decision.

**SOURCES:** Laws, 1983, ch. 445, § 7; reenacted, 1987, ch. 329, § 7, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Ineligibility for intervention, see § 99-15-107.

Conditions when intervention is appropriate, see § 99-15-109.

### **§ 99-15-115. Waiver and agreements required of offender who enters program.**

An offender who enters an intervention program shall:

(a) Waive, in writing and contingent upon his successful completion of the program, his or her right to a speedy trial;

(b) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court;

(c) Agree, in writing, to the conditions of the intervention program established by the district attorney which shall not require or include a guilty plea;

(d) In the event there is a victim of the crime, agree, in writing, to make restitution to the victim within a specified period of time and in an amount to be determined by the district attorney and approved by the court; and

(e) Agree, in writing, to waive extradition.

**SOURCES:** Laws, 1983, ch. 445, § 8; reenacted, 1987, ch. 329, § 8, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Avoidance of waiver executed pursuant to this section on date offender is removed from program for violation of program agreement, see § 99-15-123.

Prohibition of reference to program as inducement to any statement, confession or waiver by offender, see § 99-15-125.

## RESEARCH REFERENCES

**ALR.** Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Validity of state statute imposing mandatory sentence or prohibiting granting of

probation or sentence suspension of sentence for narcotics offenses. 81 A.L.R.3d 1192.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 935 et seq.

### § 99-15-117. Agreement between district attorney and offender outlining terms of program; approval by court.

In any case in which an offender agrees to an intervention program, a specific agreement shall be made between the district attorney and the offender. This agreement shall include the terms of the intervention program, the length of the program, which shall not exceed three (3) years, and a section therein stating the period of time after which the prosecutor will either dismiss the charge or seek a conviction based upon that charge. The agreement shall be signed by the offender and his or her counsel and filed in the district attorney's office. Before an offender is admitted to an intervention program, the court having jurisdiction of the charge must approve of the offender's admission to the program and the terms of the agreement.

**SOURCES:** Laws, 1983, ch. 445, § 9; reenacted, 1987, ch. 329, § 9, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Ineligibility for intervention, see § 99-15-107.

Conditions when intervention is appropriate, see § 99-15-109.

Restitution required prior to completion of program, see § 99-15-121.

Violation of agreement, see § 99-15-123.

### § 99-15-119. Written reports retained for all offenders accepted into program; information furnished to Mississippi Justice Information Center.

In all cases where an offender is accepted for intervention a written report

shall be made and retained on file in the district attorney's office, regardless of whether or not the offender successfully completes the intervention program. The district attorney shall furnish to the Mississippi Justice Information Center personal identification information on each person accepted for intervention. This information shall only be released by the Mississippi Justice Information Center in those cases where a district attorney inquires as to whether a person has previously been accepted into an intervention program.

**SOURCES:** Laws, 1983, ch. 445, § 10; reenacted, 1987, ch. 329, § 10, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Mississippi Justice Information Center generally, see §§ 45-27-1 et seq.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

### ATTORNEY GENERAL OPINIONS

The statute requires all district attorneys to furnish certain personal identification information to the Mississippi Justice Information Center (MJIC), which may only be released by MJIC in cases in which district attorneys are determining if an individual has ever participated in

such a program in the past; as non-public records, information maintained pursuant to the statute is not subject to expunction as it is an integral part of determining an individual's eligibility to the program. Spann, Jan. 24, 2000, A.G. Op. #99-0694.

### § 99-15-121. Restitution required prior to completion of program.

Prior to the completion of the pretrial intervention program the offender shall make restitution, as determined by the district attorney and approved by the court, to the victim, if any, and shall pay any expenses to the administrator of this program which are incurred as a result of his participation in the program. The amount of such expenses shall be determined by the district attorney and made part of the initial agreement between the district attorney and the offender.

**SOURCES:** Laws, 1983, ch. 445, § 11; reenacted, 1987, ch. 329, § 11, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Agreement between district attorney and offender outlining terms of program, see § 99-15-117.



## ATTORNEY GENERAL OPINIONS

This section provides that any participant in pretrial intervention program “shall pay any expenses to the administrator of this program which are incurred as a result of his participation in the program”; such payments may be used to pay additional compensation to employees of District Attorney’s office that administers pretrial intervention program, including victim’s assistance coordinator or investigator. *Kitchens*, Feb. 25, 1993, A.G. Op. #93-0093.

A district attorney may charge an administrative fee to participants in a pretrial intervention program to offset back-

ground check expenses; however, there is no authority for the expenses to be charged against a defendant who has been rejected for the pretrial intervention program. *Peterson*, Sept. 13, 2002, A.G. Op. #02-0530.

If a pretrial intervention agreement calls for random drug testing of the offender, then the district attorney may charge the offender the costs associated with such drug testing. There is no prohibition against the district attorney contracting with a drug court to perform such drug testing. *Lawrence*, Mar. 5, 2004, A.G. Op. 04-0086.

## RESEARCH REFERENCES

**ALR.** Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Validity of state statute imposing mandatory sentence or prohibiting granting of

probation or sentence suspension of sentence for narcotics offenses. 81 A.L.R.3d 1192.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 935 et seq.

## § 99-15-123. Disposition of charges upon successful completion of program; violation of program agreement by offender.

(1) In the event an offender successfully completes a pretrial intervention program, the district attorney, with the approval of a circuit court judge of his district, may make a noncriminal disposition of the charge or charges pending against the offender.

(2) In the event the offender violates the conditions of the program agreement: (a) the district attorney may terminate the offender’s participation in the program, (b) the waiver executed pursuant to Section 99-15-115 shall be void on the date the offender is removed from the program for the violation, and (c) the prosecution of pending criminal charges against the offender shall be resumed by the district attorney.

**SOURCES:** Laws, 1983, ch. 445, § 12; reenacted, 1987, ch. 329, § 12, eff from and after July 1, 1987.

**Editor’s Note** — Laws, 1987, ch. 329, § 15, provides as follows:

“SECTION 15. Chapter 445, Laws of 1983, which repeals the ‘Pretrial Intervention Act’ effective July 1, 1987, is hereby repealed.”

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Agreement between district attorney and offender outlining terms of program, see § 99-15-117.

## JUDICIAL DECISIONS

**1. Attorney discipline proceedings.**

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former

requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. *Miss. Bar v. Cofer*, 904 So. 2d 97 (Miss. 2004).

**§ 99-15-125. Law enforcement officer precluded from referring to program as inducement to any statement, confession or waiver by offender; exception.**

No law enforcement officer shall refer to, mention and/or offer participation in this program as an inducement to any statement, confession or waiver of any constitutional rights of any person accused of a crime except those enumerated in Section 99-15-115.

**SOURCES:** Laws, 1983, ch. 445, § 13; reenacted, 1987, ch. 329, § 13, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**§ 99-15-127. Department of Corrections, Division of Community Corrections to support program.**

The Department of Corrections, Division of Community Corrections, is directed to support Sections 99-15-101 through 99-15-127 to the extent that field support personnel are available in circuit court districts, and the Commissioner of Corrections shall certify to the court that the Division of Community Corrections has sufficient field parole officers to supervise and oversee those individuals who may be placed in this program by the court.

**SOURCES:** Laws, 1983, ch. 445, § 14; reenacted, 1987, ch. 329, § 14; Laws, 2002, ch. 624, § 9, eff from and after July 1, 2002.

**Editor's Note** — Laws, 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."

**Cross References** — General powers and duties of department of corrections, division of community services, see § 47-7-9.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

**ATTORNEY GENERAL OPINIONS**

An individual charged with an implied consent violation may be placed in a pre-trial intervention program as specified by Sections 99-15-101 through 99-15-127. Helfrich, April 5, 1996, A.G. Op. #96-0193.



## CHAPTER 17

### Trial

#### SEC.

- 99-17-1. Indictments to be tried within 270 days of arraignment.
- 99-17-3. Peremptory challenges; number allowed.
- 99-17-5. Peremptory challenges; joint defendant must agree.
- 99-17-7. Interpreters.
- 99-17-9. Trial in the absence of accused.
- 99-17-11. Only two counsel to a side heard.
- 99-17-13. Variance between indictment and proof; amendment of record and indictment; continuance.
- 99-17-15. Variance between indictment and proof; amendment of record and indictment; order for amendment.
- 99-17-17. Joint defendants are competent witnesses for one another in separate trials.
- 99-17-19. Assaults; insulting words admissible.
- 99-17-20. Capital murder or other crimes punishable by death.
- 99-17-21. Bribery; certain proof not necessary.
- 99-17-23. Dueling; offender compelled to testify against another.
- 99-17-25. Gambling and futures contracts; state not confined to proof of single violation.
- 99-17-27. Gambling and futures contracts; witness compelled to testify; immunity granted; penalty for refusing.
- 99-17-29. Lotteries; purchaser of ticket compelled to testify against seller.
- 99-17-31. Offenses affecting legislature; witness denied privilege against self-incrimination.
- 99-17-33. Perjury; no variance between "sworn" and "affirmed."
- 99-17-35. Instructions to jury.
- 99-17-37. Papers may be carried out by jury.
- 99-17-39. Bills of exceptions; duty of judge to sign.
- 99-17-41. Bills of exceptions; when tendered and signed; incapacity of judge.
- 99-17-43. Bills of exceptions; attorneys may sign if judge refuses.
- 99-17-45. Bills of exception; amendment.
- 99-17-47. New trials; terms directed by court; number limited.
- 99-17-49. New trials; grant or refusal assignable for error.

#### **§ 99-17-1. Indictments to be tried within 270 days of arraignment.**

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

**SOURCES:** Codes, 1857, ch. 64, art. 285; 1871, § 2785; 1880, § 3073; 1892, § 1421; Laws, 1906, § 1494; Hemingway's 1917, § 1252; Laws, 1930, § 1275; Laws, 1942, § 2518; Laws, 1976, ch. 420, eff from and after July 1, 1976.

**Cross References** — Continuances in criminal cases generally, see § 99-15-29.

## JUDICIAL DECISIONS

1. In general.
- 1.5. Good cause for delay.
2. Delay attributed to defendant.
3. Delay attributed to State.
4. State's burden.
5. Commencement of period.
6. Waiver of right.
7. On retrial.
8. Continuances; generally.
9. —At defendant's request.
10. —At state's request.
11. —Due to court congestion.
12. Length of delay.
13. Demand for trial.
14. Guilty plea.
15. Arraignment.

**1. In general.**

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. *Miller v. State*, 956 So. 2d 221 (Miss. 2007).

There was no violation of defendant's constitutional right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 or his statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 because although the four-year delay between his arraignment and his trial was unusual, most of the delay was not attributable to the State or defendant, but rather to a crime lab backlog and the appointment of new counsel. Also defendant failed to show he was prejudiced by the delay where he failed to provide the name of an alleged exculpatory witness. *Manix v. State*, 895 So. 2d 167 (Miss. 2005).

Although the time between defendant's arrest and his trial for attempted kidnapping was substantial, a portion of the delay was excluded from the "270 day rule" provided in Miss. Code Ann. § 99-17-1 as being attributable to defendant, and he failed to show how his case was prejudiced by the delay. Therefore defendant's right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Miss. Const. Art. 3, § 26 was not violated.

*Hersick v. State*, 904 So. 2d 116 (Miss. 2004).

Defendant failed to establish that his statutory right to a speedy trial was violated despite the 540-day delay, as 320 days of the delay were attributable to defendant and his counsel as a result of continuances, change in counsel, and earnest plea negotiations. *Wesley v. State*, 872 So. 2d 763 (Miss. Ct. App. 2004).

In an escape case, defendant was not denied his constitutional or statutory right to a speedy trial, because 899 of the 991 days that elapsed between the escape and the trial were attributable to defendant, and defendant suffered no prejudice as a result of the delay. *Jenkins v. State*, 881 So. 2d 870 (Miss. Ct. App. 2003).

More than four years expired between defendant's arrest and trial for murder, but defendant was free on bond after the first year, made no demand for a speedy trial, failed to show any prejudice to the defense, or that the State had intentionally delayed the investigation in its search for critical eyewitnesses and other evidence. Defendant's right to a speedy trial was not violated under the Sixth and Fourteenth Amendments to the United States Constitution, or Miss. Const. Art. III, § 26. *Moore v. State*, 837 So. 2d 794 (Miss. Ct. App. 2003).

A delay of approximately 14 months between movant's arrest and guilty plea was presumptively prejudicial as the record contained no evidence of the reason for delay, which weighed against the State, movant asserted counsel had failed to advise movant of the right to a speedy trial, counsel was ineffective, and the prejudice factor weighed in movant's favor; thus, the trial court erred in denying movant's post-conviction relief motion on the issue without a hearing, and the matter was remanded for an evidentiary inquiry. *Robinson v. State*, 920 So. 2d 1009 (Miss. Ct. App. 2003).

In a post-conviction relief case, appellant's claim that he was denied due process because he was never arraigned and his right to a speedy trial was violated failed; the record appellant submitted on appeal contained no evidence of whether

appellant was arraigned or when, or of the number of days he waited for the plea hearing after arrest. *Brooks v. State*, 832 So. 2d 607 (Miss. Ct. App. 2002).

Where defendant caused part of the delay, and was not prejudiced by it, and the State brought the action to trial as soon as was possible due to the overcrowded docket, there was no violation of defendant's statutory right to trial. *Anthony v. State*, 843 So. 2d 51 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

The defendant's right to a speedy trial was not violated when he was taken into custody for violation of his appeal bond and indicted 11 months later, because the delay was not excruciatingly long, he made no plea for a speedy trial and he showed no real prejudice. *Coleman v. State*, 725 So. 2d 154 (Miss. 1998).

Constitutional right to speedy trial exists separately from the statutory right. *Simmons v. State*, 678 So. 2d 683 (Miss. 1996).

For speedy trial purposes, finding of good cause for delay is finding of ultimate fact, and should be treated on appeal as any other finding of fact; it will be left undisturbed where there is in record substantial credible evidence from which it could have been made. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

If trial judge applied erroneous standard in ruling on motion to dismiss on speedy trial grounds, Supreme Court will not affirm trial court's finding of fact. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

For speedy trial purposes, post-delay determinations of "good cause" for delay are permissible. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

Defendant's statutory right to speedy trial was not violated by 235-day delay after arraignment; continuance order was finding of "good cause" covering 63-day delay between date of first trial setting until second trial setting, and, since day 269 fell on a Friday, neither Saturday nor Sunday counted in the computation of time period. *Skaggs v. State*, 676 So. 2d 897 (Miss. 1996).

Where day 269 of statutory speedy trial period falls on Friday, neither Saturday nor Sunday counts in computation of time. *Skaggs v. State*, 676 So. 2d 897 (Miss. 1996).

In calculating period of time between a defendant's arraignment and trial for purposes of determining whether defendant's statutory right to speedy trial has been violated, arraignment date does not count but trial date does, as do weekends unless 270th day following arraignment falls on Sunday. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

Where defendant's statutory right to speedy trial is violated, trial court must determine if violation prejudiced defendant's ability to defend against charge and if state deliberately engaged in oppressive conduct; if prejudice is present, court must dismiss proceeding and render, and if prejudice is not present, court must dismiss case for possible reindictment. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

Where defendant's statutory right to speedy trial is violated, there is no prejudice to defendant if he is serving sentence on unrelated charges. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

Defendant's statutory right to speedy trial was not violated, despite total time between his arraignment on charge of capital rape and his trial of 355 days and statutory threshold of 270 days; 44 days of delay were attributable to continuances requested by defense, and at least 154 days were attributable to efforts of defense attorney to work out plea bargain, leaving total of 157 days of delay attributable to state. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

The balancing test used in criminal proceedings for determining whether the right to a speedy trial has been violated is not applicable in an attorney disciplinary action; although attorney disciplinary proceedings are quasi-criminal in nature, they are not governed by the same rules that are utilized in criminal proceedings. *Barrett v. Mississippi Bar*, 648 So. 2d 1154 (Miss. 1995).

The Supreme Court has subject matter jurisdiction to hear an appeal by the State from a dismissal with prejudice for viola-



tion of this section's 270-day rule under § 99-35-103(a). *State v. Harrison*, 648 So. 2d 66 (Miss. 1994), overruled on other grounds, *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

Dismissal with prejudice is not required by this section unless the State, upon the finding of a violation, fails to persuade the court that the violation did not prejudice the defendant's ability to defend against the charge and that the State did not deliberately engage in oppressive conduct; if the court is so persuaded, the remedy shall be dismissal without prejudice to reindictment. *State v. Harrison*, 648 So. 2d 66 (Miss. 1994), overruled on other grounds, *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

This section was not violated, even though 273 days elapsed from the time the defendant was arraigned to the date he filed his motion to dismiss, where the statute was tolled for 23 days during plea negotiations, a continuance carrying the case over to the following term due to a congested trial docket tolled the statute for an additional 14 days, the defendant did not object to that continuance, the statute was again tolled for 5 days between the time of the motion to dismiss and the hearing on that motion, the case was tried within 30 days after the motion to dismiss was overruled, and there was no prejudice to the defendant, as he was already incarcerated for a parole violation of a previous felony conviction and was also under indictment for another offense for which he was awaiting trial. *Winder v. State*, 640 So. 2d 893 (Miss. 1994).

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

Although long delays between the time of arrest and arraignment have the potential to violate the defendant's constitu-

tional right to a speedy trial even if the 270 day mandate of this section has been met, the State's compliance with this section would be viewed as significant when determining whether the defendant's constitutional right to a speedy trial had been violated. *Spencer v. State*, 592 So. 2d 1382 (Miss. 1991).

The statutorily created right to a speedy trial was never invoked where the defendant entered his pleas of guilty on the day he was arraigned. *Anderson v. State*, 577 So. 2d 390 (Miss. 1991).

Since the right to a speedy trial is a right personal to the accused, the right should not be waived because of delays occasioned by a co-defendant for which the accused was not in any way responsible. *Flores v. State*, 574 So. 2d 1314 (Miss. 1990).

The constitutional right to a speedy trial attaches when a person has been accused. *Smith v. State*, 550 So. 2d 406 (Miss. 1989).

A defendant was denied his constitutional right to a speedy trial, even though he did not assert his right to a speedy trial until 5 days before trial began, where 370 days elapsed between the date he was arrested and the date his trial began and, because the defendant was convicted in federal court on the charge of making a false statement in the acquisition of a firearm 279 days after his arrest in the case in question, the delay resulted in the defendant being sentenced as an habitual offender. *Smith v. State*, 550 So. 2d 406 (Miss. 1989).

Compliance with this section does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected. *Smith v. State*, 550 So. 2d 406 (Miss. 1989).

The mere fact that the defendant is in custody for another crime is generally not a sufficient reason for delaying a trial. However, the situation is different where the defendant is facing a death sentence for the other crime; a court is justified in choosing not to expend scarce judicial and prosecutorial resources in trying a defendant facing a death sentence, the execution of which would eliminate the need for any trial at all. *Fisher v. State*, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

This section has no application in action by Mississippi State Bar seeking disbarment of attorney based on convictions for checks issued when attorney had insufficient funds in bank to pay amount of checks. *Mississippi State Bar Ass'n v. Cotter*, 512 So. 2d 1288 (Miss. 1987), reinstatement granted, 611 So. 2d 1015 (Miss. 1993).

Plea negotiations will not always constitute good cause for delay under 270 day rule, because such rule could serve no useful purpose and would defeat the very purpose and protections established by 270 day rule. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

Where the time lapse between arraignment and trial was only 109 days, the case did not fall under this section. *Lightsey v. State*, 493 So. 2d 375 (Miss. 1986).

Nine hundred and forty-six day delay between arraignment and trial on charges of burglary and being habitual criminal does not violate defendant's speedy trial right where defendant is originally imprisoned pursuant to voluntary plea of guilty to what defendant thinks is lesser included offense, such disposition of case takes place well within time required by this section, defendant succeeds in having conviction overturned, and trial is held 76 days after order overturning original conviction. *Darby v. State*, 476 So. 2d 1192 (Miss. 1985).

Under the provisions of § 1-3-67 and this section, the date of a defendant's arraignment should be excluded and the date of trial should be included in determining whether a defendant has been tried more than 270 days after his arraignment in violation of § 99-17-1. *Ransom v. State*, 435 So. 2d 1169 (Miss. 1983).

Under this section the time prior to arraignment is not computed to determine compliance with the statute. *Perry v. State*, 419 So. 2d 194 (Miss. 1982).

In a prosecution for burglary as an habitual offender, the defendant was not deprived of his right to a speedy trial where the delay from the date of the offense to the day of trial had resulted from the fact that the grand jury was not in session when the crime was committed and from a crowded court docket and where the defendant had failed to show

any prejudice resulting from the delay. *Diddlemeyer v. State*, 398 So. 2d 1343 (Miss. 1981).

In a prosecution for armed robbery, the defendant's claim that he had been denied his right to a speedy trial was properly rejected by the trial court where the evidence showed that, as soon as the state had learned that the defendant was incarcerated in Louisiana, steps had been taken to have him extradited and returned to Mississippi and where the defendant's claim of prejudice resulting from the delay was invalid since he had been unable to give either the name or the whereabouts of an alleged alibi witness. *Saxton v. State*, 394 So. 2d 871 (Miss. 1981).

The statute was not applicable to a defendant's claim of denial of his right to a speedy trial due to a delay of over 16 months between the alleged criminal act and his trial where the defendant had been arraigned only one week prior to trial; preindictment delays are controlled exclusively by the applicable statute of limitations. *Speagle v. State*, 390 So. 2d 990 (Miss. 1980).

In a prosecution for the sale of a controlled substance, the trial court erred in not dismissing the indictment where more than 270 days had passed from the time of arraignment until the date of trial. *Payne v. State*, 363 So. 2d 278 (Miss. 1978).

Adjournment of court without trial of felony charged by indictment returned during term was not denial of constitutional right to speedy trial. *Heard v. Clark*, 156 Miss. 355, 126 So. 43 (1930).

### 1.5. Good cause for delay.

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. *Flora v. State*, 925 So. 2d 797 (Miss. 2006).



Where approximately 1,015 days passed between the date of defendant's arraignment and trial and the prosecution conceded responsibility for less than 270 days of that time, absent additional evidence showing that the delay was not for good cause, the appellate court deferred to the trial court's finding that good cause existed for the delay. *Lawrence v. State*, 928 So. 2d 894 (Miss. Ct. App. 2005).

## **2. Delay attributed to defendant.**

Defendant's claim that right to speedy trial was violated was rejected because, even as late as the day of trial, defendant did not want a speedy trial, and what defendant wanted was a dismissal of the charges against him; moreover, part of the reasons for delays in the case was defendant's own unwillingness to cooperate with defense counsel. *Guice v. State*, 952 So. 2d 129 (Miss. 2007).

Where a total of 371 days transpired between the date of appellant's arraignment and the date of trial, appellant's right to a speedy trial was not violated under the 270-day rule, because 247 days were chargeable to appellant due to a change of lawyers and appellant's failure to appear to enter a guilty plea. *Brunson v. State*, 944 So. 2d 922 (Miss. Ct. App. 2006).

Defendant was not denied his statutory right to a speedy trial where delays between September 20, 2001, and November 30, 2001, were due to defendant or to the death of defendant's attorney's wife, and those days did not count against the State. The trial judge attributed the delay between November 30, 2001, and June 18, 2002, to an overcrowded docket and another criminal trial proceeding against defendant. *Bindon v. State*, 926 So. 2d 222 (Miss. Ct. App. 2005).

Continuances for good cause covered a period of 350 days which, when subtracted from the total delay of defendant's trial of 393 days, resulted in a delay counted against the State of 43 days; accordingly, defendant was tried within the 270-day statutory limit. *Stark v. State*, 911 So. 2d 447 (Miss. 2005).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation

under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in *Barker*, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. *Summers v. State*, 914 So. 2d 245 (Miss. Ct. App. 2005).

There was no violation of defendant's statutory right to a speedy trial under Mississippi's speedy trial statute, Miss. Code Ann. § 99-17-1, because defendant was responsible for much of the extraordinary 37-month lapse of time between his arrest and his trial due to his failure to provide necessary documentation to the hospital for his mental examination, his preparation for trial, and the illness of his counsel. Also defendant failed to assert his right to a speedy trial and to show any real prejudice that outweighed any delay resulting from the trial court's congested schedule. *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Where there were considerably more than 270 days between the date when arraignment was waived and the beginning of trial, there was no violation of the statutory right to a speedy trial; although the trial judge himself may have taken more time to review the records than was absolutely necessary, defendant's seeking that review and the trial court's granting it were sufficient reasons to consider that part of the delay to have been the responsibility of defendant himself. *Peters v. State*, 864 So. 2d 983 (Miss. Ct. App. 2004).

Defendant's statutory right to a speedy trial was not violated where 67 of the 339 days before he was brought to trial were attributed to the request for a psychiatric evaluation and where defense counsel declined an offer by the trial court to reschedule the trial date to an earlier date that would have fallen within the 270-day requirement. *Bell v. State*, 847 So. 2d 880 (Miss. Ct. App. 2002), cert. denied, 847 So. 2d 866 (Miss. Ct. App. 2003).



Where defendant did not pursue his motion for a speedy trial until the trial court began the sentencing phase, at which time the trial court held the motion was moot since trial had already been concluded, and defendant had multiple changes of attorneys representing him, the delay was charged to defendant; thus, defendant was not denied his right to a speedy trial. *Craft v. State*, 832 So. 2d 467 (Miss. 2002).

Defendant's conviction of armed robbery was affirmed where the speedy trial, improper testimony and impeachment, jury instruction, and weight of the evidence issues that she raised on appeal had no merit; defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 was not implicated because only 162 days of the total time that transpired due to continuances could be counted towards the 270 days within which an accused was to be brought to trial under the statute. *Jones v. State*, 846 So. 2d 1041 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

State sufficiently met the burden of establishing good cause for the delays of defendant's trial as the delays were caused by defendant, defendant did not assert his right to a speedy trial until five days before trial, there was no prejudice because of delays, and the State successfully rebutted the presumption of prejudice. *Wheeler v. State*, 826 So. 2d 731 (Miss. 2002).

Defendant's statutory right to a speedy trial was not violated when the delay was attributable to defendant, who was charged with aggravated assault and kidnapping. *Russell v. State*, 832 So. 2d 551 (Miss. Ct. App. 2002), cert. denied, 832 So. 2d 533 (Miss. Ct. App. 2002).

Trial began 379 days after one defendant's arraignment and 330 days after the other defendant's arraignment, but defendants were responsible for 238 days of delay between the times of their arraignments and trial; thus, the number of days awaiting trial was well below the 270-day threshold dictated by the Mississippi speedy trial statute and neither defendant's statutory right to a speedy trial was violated. *Collins v. State*, 817 So. 2d 644 (Miss. Ct. App. 2002).

Defendant's claim that the State failed to bring him to trial within the 270-day period prescribed in Miss. Code Ann. § 99-17-1 was without merit, where the delay in bringing the case to trial was a result of defendant's own actions and inactions. *Poole v. State*, 826 So. 2d 1222 (Miss. 2002).

There was no violation of the defendant's statutory right to a speedy trial, notwithstanding a 427-day delay between arraignment and trial, where 162 days of the delay were caused by the defendant's multiple changes of counsel. *Beckum v. State*, — So. 2d —, 2000 Miss. App. LEXIS 568 (Miss. Ct. App. Dec. 5, 2000).

Where the delays in defendant's trial resulted from numerous continuances due to attorneys' withdrawals, the defendant's skipping bond, and a psychiatric evaluation, none of that time could be charged to the state. *Elder v. State*, 750 So. 2d 540 (Miss. Ct. App. 1999).

The defendant was not denied his right to speedy trial under this section where delays beyond the allowed 270 days were caused by his requests for continuances, his motions, and his submission to a mental evaluation pursuant to court order. *Snow v. State*, 735 So. 2d 1094 (Miss. Ct. App. 1999).

There was no violation of the defendant's right to a speedy trial where delays in excess of 270 days were caused by the defendant's volitional change of attorneys and his second attorney's subsequent motion to withdraw based on the fact that the defendant had lost faith in him. *Beckum v. State*, — So. 2d —, 1999 Miss. App. LEXIS 91 (Miss. Ct. App. Mar. 9, 1999).

The defendant was not denied his right to a speedy trial, notwithstanding a delay of about 915 days from his arraignment to the commencement of trial, where he was tried within the 270 day limit after deduction of the time which lapsed due to the court's consideration of various defense motions. *Brewer v. State*, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

No violation of defendant's statutory right to speedy trial occurred, absent any oppressive conduct by state, even if trial was delayed by more than 270 days; most delay was occasioned by defendant's own

motions or inaction, and defendant was in fact tried in less than eight months after arraignment. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Any delay over 125 days that elapsed between date of arraignment and first trial date were attributable to defendant for purposes of statutory right to speedy trial, where defendant fled jurisdiction, fought extradition, and was uncooperative with attorney when present. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Delay in finding and preparing new experts after trial court issued subpoena duces tecum against defense expert and expert withdrew was not chargeable to state for purposes of 270-day speedy trial period, where defendant did not challenge subpoena issue independently of 270-day speedy trial motion. *Hull v. State*, 687 So. 2d 708 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997).

A defendant was not denied his statutory or constitutional rights to a speedy trial, even though he was arrested on February 13, 1989, arraigned May 5, 1989, and his trial began March 5, 1990, where the defendant filed 15 motions before he was brought to trial which substantially contributed to the delay, the record supported the State's position that it could not try the case until the issues of change of venue and admissibility of forensic DNA analysis had been resolved, and the defendant did not contend that the delay either diminished his defense or strengthened the State's evidence, but stated only that he suffered "a great deal of anxiety." *Polk v. State*, 612 So. 2d 381 (Miss. 1992).

A defendant was not denied his right to a speedy trial under this section, even though 441 days elapsed between his arrest and trial, where the defendant was never arraigned, and the record reflected that the defendant did not want a speedy trial and it was mutually agreed that neither side would push for a speedy trial. *Mitchell v. State*, 609 So. 2d 416 (Miss. 1992).

A defendant's constitutional and statutory rights to a speedy trial were not violated, even though the delay between the defendant's arrest and trial was 378

days and the delay between arraignment and trial was 370 days, where only one of the delays—a continuance requested by the State solely for its prosecutorial tactical advantage—was attributable to the State, and, after calculating the delays caused by the defendant, he came to trial 164 days after his arrest and 156 days after his waiver of arraignment. *Ross v. State*, 605 So. 2d 17 (Miss. 1992).

A defendant's right to a speedy trial under this section was not violated, even though his trial occurred 347 days after his arraignment, where all of the delays were prompted by the defendant and none were attributable to the State. *Baine v. State*, 604 So. 2d 258 (Miss. 1992).

A defendant's statutory right to a speedy trial under this section was not violated, even though his trial occurred 460 days after his arrest, where the trial occurred only one day after his arraignment. Additionally, the defendant's constitutional right to a speedy trial was not violated where the defendant moved for 2 continuances during the period between the indictment and the trial which resulted in 181 days of time lost, much of the remaining delay could be attributed to 5 changes in the defendant's attorney, the delay was for good cause to allow his counsel sufficient time to prepare for trial, there were no deliberate attempts by the State to cause a delay to hamper the defendant's ability to prepare a defense, and there was no showing of prejudice to the defendant. *Wiley v. State*, 582 So. 2d 1008 (Miss. 1991).

State showed good cause for delay in trial held 293 days after initial arraignment, where defendant acquiesced in and initiated much of plea bargaining that caused resulting delay and State made every effort to reach plea agreement and relied on defendant's indication that such agreement was forthcoming and acceptable. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

Delay resulting from withdrawal of attorney for defendant is excluded from time within which defendant must be brought to trial where defendant has acquiesced in withdrawal. *Nations v. State*, 481 So. 2d 760 (Miss. 1985).

The trial court erred in granting the motions of two defendants to dismiss the



indictments against them for failure to grant them a speedy trial where, although the period between arraignment and the filing of the motions was 294 days, continuances totalling approximately 49 days had been granted without protest or objection by the defendants and without their requesting trial during this period of time. *State v. Sistrunk*, 404 So. 2d 564 (Miss. 1981).

A defendant was not denied his right to a speedy trial where, although the trial took place 385 days after the indictment, most of the delay between the date of the indictment and the date of trial resulted from the difficulty in getting a psychiatric examination at the state institution as requested by the defense. Moreover, the defendant was not arraigned until the day the trial began. *Gator v. State*, 402 So. 2d 316 (Miss. 1981).

In a prosecution for burglary, the trial court properly overruled defendant's motion for dismissal on speedy trial grounds, even though defendant was tried 584 days after his arraignment, where defendant's original attorney was unable to appear because of a death in his family, where defendant's court-appointed attorney requested a continuance on the grounds that he needed more time to prepare, where the prosecution requested a continuance because of the absence of a material witness, and where defendant was finally tried during the court's fourth term after arraignment; good cause was shown for the delay and defendant's constitutional right to a speedy trial was not violated. *Durham v. State*, 377 So. 2d 909 (Miss. 1979).

### 3. Delay attributed to State.

The court would reverse and remand to the trial court for a hearing to determine whether the defendant was prejudiced by the delay in his trial where (1) the delay between his arraignment and trial included 320 days that ran against the state, (2) there were no continuances on the record with regard to the overcrowded docket and there was no evidentiary basis, such as the docket calendars, to support the exclusion of any of the delay due to an overcrowded docket, and (3) the defendant filed a motion to dismiss his indictment for failure to provide him a speedy trial

well within the 270 day period. *Frazier v. State*, 739 So. 2d 443 (Miss. Ct. App. 1999).

A defendant's statutory right to a speedy trial was violated where no motion for a continuance was ever made by either the defendant or the State, the only occurrence between the arraignment and the trial which would toll the 270-day period was the defendant's motion to suppress and, even after discarding the days when the motion was being considered, more than 270 days passed between the arraignment and the trial, and there was no showing by the State in the record of good cause for the delay. *Ford v. State*, 589 So. 2d 1261 (Miss. 1991).

A defendant was entitled to a reversal of his conviction and a discharge for violation of his right to be tried within 270 days of his arraignment where 75 days elapsed from the date of the defendant's waiver of arraignment to the first indictment until the date the indictment was nol prossed, 144 days elapsed from the date the defendant was arraigned for the same offense under a second indictment to the date of the first motion to quash the indictment for failure to comply with the statutory 270-day rule, 174 days elapsed from the date of the arraignment to the date on which the second motion to quash was made, the defendant was tried 341 days after the second arraignment, there was no motion made by the defendant for a continuance or any reason on his part to cause any delay, and nothing appeared in the record either excusing or justifying the delay, even though the State did not ask for any delay except that occasioned by the nolle prosequi. *Moore v. State*, 556 So. 2d 1031 (Miss. 1990).

Delay of almost 10 months in bringing parolee arrested on burglary charges to trial following parolee's demand for speedy trial does not deny parolee speedy trial rights under this section where only 47 days elapse from arraignment to trial but does violate constitutional speedy trial right where delay has been caused by state and parolee, whose parole has been revoked as result of arrest, is prejudiced by being ineligible for parole and disqualified from participating in rehabilitation programs because of detainer filed in con-



nection with burglary arrest, and by being unable to properly locate witnesses to substantiate defense that someone else stole car and performed burglary. *Bailey v. State*, 463 So. 2d 1059 (Miss. 1985).

In a prosecution for embezzlement defendant's conviction of such crime would be reversed on the ground that the defendant had been denied his right to a speedy trial, where the delay from the time of defendant's having become an accused until trial was about 19 months, where the prosecutor offered no excuse for the delay, and where the defendant had sent a written request by mail to the sheriff asking for appointed counsel and a speedy trial. *Perry v. State*, 419 So. 2d 194 (Miss. 1982).

In a prosecution for the rape of a female child under the age of 12-years, the trial judge erred in failing to dismiss the case for failure to bring the defendant to trial within 270 days of arraignment where there was no good cause shown for the delay and where the failure to conduct a psychiatric examination of defendant as ordered by the court was attributable to the state. *Selvidge v. Taylor*, 383 So. 2d 489 (Miss. 1980).

Where the state knows the identity of the accused, has the accused in custody, obtains a confession, and holds the accused in a penitentiary for a period of over eight years, during which time the accused has suffered many disadvantages resulting from the delay, then the delay is vexatious, capricious and oppressive, and the accused has been denied a speedy trial as contemplated by the Constitution. *Jones v. State*, 250 Miss. 186, 164 So. 2d 799 (1964).

#### 4. State's burden.

Five-year period between mistrial on defendant's murder charge and entry of nolle prosequi of indictment, which was followed more than twenty years later by reindictment and conviction, did not violate defendant's right to speedy trial, though length of such period was presumptively prejudicial to defendant; defendant never asserted his speedy trial rights, defendant acquiesced in delay caused by state agency's assistance to his defense without prosecution's knowledge, and defense was not prejudiced, as all material evidence from prior proceedings

was preserved. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

When length of pretrial delay is presumptively prejudicial, burden of persuasion is on state to show that delay did not prejudice defendant and violate his speedy trial rights. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Where accused is not tried within 270 days of arraignment, state has burden of establishing good cause for delay, as accused is under no duty to bring himself to trial. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Where accused is not tried within 270 days of arraignment, State bears burden of establishing good cause for delay. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

Where accused is not tried within 270 days of arraignment, state bears burden, under speedy trial statute, of establishing good cause for the delay. *Skaggs v. State*, 676 So. 2d 897 (Miss. 1996).

For purpose of calculating period of time between a defendant's arraignment and trial for purposes of determining whether defendant's statutory right to speedy trial has been violated, state bears burden of showing good cause for delay between arraignment and trial if record is silent as to reasons. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

Where a defendant contended that his statutory and constitutional rights to a speedy trial were violated because he was tried more than 600 days after his arrest and arraignment, the State bore the burden of positively demonstrating that the backlog of drug cases in the court system and the state crime lab, which were alleged to be the reasons for the delay, actually caused the delay in that particular case. *McGee v. State*, 608 So. 2d 1129 (Miss. 1992).

Where the facts reflect that the accused's trial did not commence within 270 days of arraignment, the State bears the burden of establishing that there was good cause for delay. *Vickery v. State*, 535 So. 2d 1371 (Miss. 1988).

**5. Commencement of period.**

Defendant's statutory speedy trial right was not violated where he was tried five days after his arraignment, even though the trial occurred 554 days after his arrest. *Brengett v. State*, 794 So. 2d 987 (Miss. 2001).

The starting point of the 270-day period for the defendant's trial was the date of his reindictment rather than the date of his original indictment, which was quashed, since the defendant failed to put a date of arraignment in the record that the court could consider in deciding if his 270-day right to a speedy trial had been violated. *Forrest v. State*, 782 So. 2d 1260 (Miss. Ct. App. 2001).

In a prosecution for attempting to intimidate a witness, the 270-day period under this section began to run on the date of arraignment on the indictment for attempting to intimidate a witness, rather than the date of arraignment on a prior indictment for aggravated assault, even though both indictments arose out of the same transaction and occurrence; even if the defendant had been reindicted on the same offense, the 270-day period would have commenced on the date of arraignment of the reindictment. *Corley v. State*, 584 So. 2d 769 (Miss. 1991).

For constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest. The statutory right to a speedy trial set forth in this section attaches with arraignment; calculation of statutory time requires exclusion of the date of arraignment and inclusion of the date of trial and weekends, unless the last day of the 270-day period falls on Sunday. Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time. Any continuances for "good cause" will toll the running of time unless "the record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." The statutory 270-day rule is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. *Handley v. State*, 574 So. 2d 671 (Miss. 1990).

A defendant's right to a speedy trial was not violated, even though the defendant

was tried for capital murder more than 270 days after his original arraignment on an indictment for murder less than capital, where the defendant was reindicted for capital murder and was tried well within the 270-day rule from the time of the arraignment on the capital murder charge. *Galloway v. State*, 574 So. 2d 1 (Miss. 1990).

**6. Waiver of right.**

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. *Roach v. State*, 938 So. 2d 863 (Miss. Ct. App. 2006).

Defendant's motion was filed well after the expiration of the 270 days of the arraignment and he failed to demonstrate any prejudice from the delay occurring between his arraignment and trial. Therefore, even though a clear violation of Miss. Code Ann. § 99-17-1 occurred, he waived his right to complain about the denial of his statutory right to a speedy trial. *Guice v. State*, 952 So. 2d 187 (Miss. Ct. App. 2006).

Although a clear violation of Miss. Code Ann. § 99-17-1 occurred where a total of 596 days passed from the time defendant was initially arraigned to the commencement of trial, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert this right until well after the deadline had passed, and even then, failed to obtain a ruling on the motion; defendant also failed to show any prejudice. *Anderson v. State*, 874 So. 2d 1000 (Miss. Ct. App. 2004).

Defendant failed to raise, within 270 days of his arraignment, the issue that his right to a speedy trial had been violated under Miss. Code Ann. § 99-17-1 and, therefore, acquiesced to the delay. *Mims v. State*, 856 So. 2d 518 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Defendant's motion for post-conviction relief was properly dismissed where his guilty plea to false pretenses waived his



right to a speedy trial under Miss. Code Ann. § 99-17-1. *Hinton v. State*, 812 So. 2d 255 (Miss. Ct. App. 2002).

When a defendant asserts a violation of the 270 day statute, the threshold question of whether the defendant made some sort of timely assertion of his right to be tried within 270 days is critical to consideration of the issue on the merits; thus, a prolonged failure to raise the right to be tried speedily can constitute a waiver of the statutory right to be tried within 270 days of arraignment. *Little v. State*, 744 So. 2d 339 (Miss. Ct. App. 1999).

A defendant was not denied his statutory right to a speedy trial, even though 344 elapsed from the date of arraignment to the date of trial, where the defendant waived his statutory speedy trial rights for a 229-day period due to his agreement to the trial setting. *McGhee v. State*, 657 So. 2d 799 (Miss. 1995).

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. *Anderson v. State*, 577 So. 2d 390 (Miss. 1991).

## 7. On retrial.

Rule contained in Miss. Code Ann. § 99-17-1 that an accused be brought to trial within 270 days of his indictment unless there was good cause for delay did not apply to defendant's retrial, and thus, defendant was relegated to the constitutional speedy trial standards to argue that the delay in retrying him violated his right to a speedy trial. *Stevens v. State*, — So. 2d —, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Where the state made a good faith mistake in ordering a nolle prosequi after the first indictment, the time for speedy trial commenced at the time of the arraignment of the defendant on his re-indictment. *State v. Shumpert*, 723 So. 2d 1162 (Miss. 1998).

A defendant was not denied his right to a speedy trial, even though his retrial did not commence until 383 days after the reversal of his original conviction, where part of the delay could be attributed to the logistics of a change in venue, the defendant apparently did not assert his right to a speedy trial, and there was no prejudice,

particularly since it was in the defendant's best interest that the retrial be delayed as both parties searched to secure the attendance of a witness whom the defendant claimed was critically important to have as a live eyewitness at trial; the delay did not violate this section since the 270-day rule does not apply to retrials. *Mitchell v. State*, 572 So. 2d 865 (Miss. 1990).

This section requires only that indictments be tried within 270 days of arraignment, and, where the first trial results in a mistrial, the statute is not applicable to require that the retrial take place within 270 days of the first trial. *Kinzey v. State*, 498 So. 2d 814 (Miss. 1986).

Defendant's speedy trial rights were not violated by his retrial approximately 352 days after mistrial where some of the delay was caused by overcrowded dockets necessitating continuances, the defendant failed to assert his right until approximately 3 weeks before his retrial was scheduled to begin, and defendant failed to show prejudice resulting from the delay. *Kinzey v. State*, 498 So. 2d 814 (Miss. 1986).

If a mistrial results, or if a case is reversed on appeal for retrial, compliance with this section is satisfied; the time for retrial then becomes a matter of discretion with the trial court to be measured by the constitutional standards of reasonableness and fairness under the constitutional right to a speedy trial. Thus, in a prosecution for murder in which a conviction was obtained after a fourth retrial, the defendant was not denied her right to a speedy trial by a delay of 475 days between the filing of the Supreme Court mandate and the trial where the delay was attributable to continuances which had been granted and where the defendant neither asserted a right to a speedy trial nor alleged any prejudice that flowed from the trial delay. *Carlisle v. State*, 393 So. 2d 1312 (Miss. 1981).

The trial court properly denied a motion that the defendant be discharged because more than 270 days had passed since his arraignment where the delay resulted from the reversal of his conviction on appeal and remand for a new trial. *Atkinson v. State*, 392 So. 2d 205 (Miss. 1980).



**8. Continuances; generally.**

In calculating the length of the delay, the court properly subtracted the period of delay attributable to a continuance caused by the state's involvement in another trial; the defense presented no evidence that some part of the basis for the state's selecting the other cases for trial was bad faith in delaying the defendant's trial. *Rhyn v. State*, 741 So. 2d 1049 (Miss. Ct. App. 1999).

A continuance caused by a change in dockets was for good cause and would not be charged to the state since the change in dockets was caused by a conflict of interest on the part of the judge, whose husband, a narcotics officer, was listed in the case as a potential witness. *Williams v. State*, 747 So. 2d 276 (Miss. Ct. App. 1999).

Continuances for good cause toll running of 270-day statutory speedy trial period, unless record is silent regarding reason for delay, and then clock ticks against state. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Eighteen-month delay did not violate defendant's statutory speedy trial right, as statute was tolled for informal continuance to allow defendant to file motion for psychiatric evaluation, for informal continuance to allow defense time for trial preparation, and for formal continuance for psychiatric evaluation. *Simmons v. State*, 678 So. 2d 683 (Miss. 1996).

Generic continuance such as one granted "for good and sufficient cause" does not satisfy requirements for exclusion under statute governing defendant's right to speedy trial. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

Even where record contains no indication that written order of continuance was granted, statutory speedy trial clock may be tolled if state and defendant orally agree to continuance, defendant agrees to enter plea negotiations, or defense attorney fails to appear for trial because of death in family. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

The time expended as a result of a continuance sought by a codefendant because of the State's failure to comply with discovery would be counted against the

State in determining whether the defendant was denied his statutory right to a speedy trial. *Flores v. State*, 586 So. 2d 811 (Miss. 1991).

The "bumping" of a trial due to the continuance of another criminal prosecution was "good cause" for a continuance under this section. *Folk v. State*, 576 So. 2d 1243 (Miss. 1991).

A finding of "good cause" for a continuance under this section is a finding of ultimate fact, and should be treated as any other finding of ultimate fact challenged on appeal, i.e., the finding will be undisturbed only where there is in the record substantial, credible evidence from which it may fairly have been made, and will ordinarily be reversed where there is a complete absence of probative evidence in the record. *Folk v. State*, 576 So. 2d 1243 (Miss. 1991).

A trial court did not err in refusing to delay the trial until the defendant, who was deaf, could be taught to use sign language where the court had no way of ascertaining whether the defendant would learn sign language nor the degree to which it could improve his ability to understand and communicate, the defendant was able to read, he was a high school graduate and a college student, and he was kept advised of what was being argued and what testimony was being presented during the trial. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

While it would be better practice for trial judge to recite in order granting continuance what cause is for continuance, this is not necessary in order that continuance toll running of time within which defendant must be brought to trial; written order reciting that motion for continuance is well taken and should be granted is equivalent of judicial determination that good cause exists for continuance. *Nations v. State*, 481 So. 2d 760 (Miss. 1985).

This section, requiring that defendant be brought to trial within 270 days of arraignment, was not violated, despite 272 days having elapsed between defendant's arraignment and trial, where 23 days were deductible from the 270-day period as representing the time during which a continuance was in effect for the

purpose of affording defendant a psychiatric examination. *Brady v. State*, 425 So. 2d 1347 (Miss. 1983).

Although capital cases are required to be tried during the term in which the indictment is returned, unless good cause is shown to the contrary, the granting of a motion by the defendant for continuance is a matter largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of sound discretion. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

The necessary time for the accused and his counsel to prepare his trial must necessarily be left largely to the sound discretion of the trial judge, bearing in mind the facts and circumstances of the particular case. *Gilmore v. State*, 225 Miss. 173, 82 So. 2d 838 (1955).

Application for continuance to the next term of a murder prosecution was properly denied where the crime was committed in July, the indictment was had in October, the accused employed two attorneys the day the indictment was returned, all of the testimony involved one place and one occasion, all witnesses were available both to the state and to the accused, and apparently all testified, and the court set the case for trial a week after hearing the motion. *Garner v. State*, 202 Miss. 21, 30 So. 2d 413 (1947).

The granting of a continuance of ten days between the setting of the case and the date of trial was held not an insufficient time to interview witnesses and prepare for the defense of the case where it was not shown that the witnesses were unavailable, the court remarking that a compliance with the statute would make for a more efficient administration of justice and that the failure to comply therewith was all too frequent. In that case, the indictment was returned during the September term but the case was not tried until the following February and the defendant's attorney represented him during this time. *McClellan v. State*, 183 Miss. 184, 184 So. 307 (1938).

#### 9. —At defendant's request.

The defendant's right to a speedy trial was not violated where 515 days of delay were attributable to the defendant's con-

tinuances and changing of attorneys, which left the state responsible for only 129 days of delay. *Sharp v. State*, 786 So. 2d 372 (Miss. 2001).

Taking into consideration the good cause delays due to crowded dockets supported by court order and the continuance granted the defense, no violation of the 270 day rule occurred. *Buggs v. State*, 738 So. 2d 1253 (Miss. Ct. App. 1999).

Continuances that are attributed to defendant stop running of statutory speedy trial clock and are deducted from total number of days before trial. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

For purposes of determining whether defendant's statutory right to speedy trial has been violated, continuance requested by defendant is charged to defense. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

A defendant was not denied his statutory right to a speedy trial on charges of intimidating a witness, even though 343 days elapsed between the defendant's arraignment and trial, where the trial was delayed due to a continuance granted to the defendant; the defendant's argument that the continuance did not toll the running of the statutory period on his indictment for intimidating a witness because, due to an administrative error in transferring his indictment from circuit court to county court, the continuance was not granted on the multi-count indictment for attempting to intimidate a witness but on a prior aggravated assault charge that had been dismissed by the circuit court, was without merit where the defendant did not believe when the cause was transferred to the county court that the transferred charge was for aggravated assault, and the defendant sought, and was granted, a continuance from county court while proceeding under the assumption that he was being charged with intimidating a witness. *Corley v. State*, 584 So. 2d 769 (Miss. 1991).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37



days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. *Adams v. State*, 583 So. 2d 165 (Miss. 1991).

A defendant's right to a speedy trial was not violated since this section's 270-day period was tolled from the time of the first continuance which was granted on the defendant's motion, until the date of the end of the second continuance in which the defense counsel actively participated. *Arnett v. State*, 532 So. 2d 1003 (Miss. 1988).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance where the newly appointed defense attorney had 24 days to prepare for trial. *Fisher v. State*, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

Refusal to grant continuance to defendant on basis of failure of state to comply with motion for discovery, made 5 months prior to trial, until day prior to trial is reversible error. *McKinney v. State*, 482 So. 2d 1129 (Miss. 1986).

In a prosecution for rape, a delay of 150 days between arraignment and trial was not unreasonable where the delay was caused by two continuances, one of which was requested by the defense in order for it to complete psychological tests of the defendant and the other which was requested by the District Attorney because there was no prosecutor available. *Davis v. State*, 406 So. 2d 795 (Miss. 1981), appeal dismissed, cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

In a prosecution for felonious possession of marijuana, the trial court erred in dismissing the indictments and discharging defendants on speedy trial grounds, where one delay was requested by the state after defendants filed on the day set for trial, without notice, a motion to quash the

indictment because of alleged racial discrimination in the selection of the jury's foreman, where defendants requested one continuance, and where the state requested another continuance because of the absence of its expert witness; the delays, which were granted in the absence of any objection by defendants, were entered for good cause. *State v. Davis*, 382 So. 2d 1095 (Miss. 1980).

#### 10. —At state's request.

Period from defendant's arraignment to his trial was within the statutorily required 270 days, Miss. Code Ann. § 99-17-1, but compliance with the statute did not mean that defendant's constitutional right to a speedy trial had been respected; however, the State made its requests for continuances because it needed to secure the testimony of an essential witness. Without the witness's testimony, the State had no evidence showing that the victim was shot, killed, placed in garbage bags, and thrown into a river; because the State requested its continuances for good cause, because the delays were not egregiously protracted, and because defendant failed to show actual prejudice, defendant's right to a speedy trial was protected. *Jackson v. State*, 924 So. 2d 531 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750 (Miss. 2006).

Where the length between the defendant's arrest and first trial was approximately one year and the state asserted that a continuance was necessary because the state was looking for a material witness, the continuance was not requested in order to prejudice the defendant from being tried within 270 days; rather, it was a legitimate action on the part of the prosecution to submit to the jurors a complete picture of what transpired the evening that the crime occurred. *Holiday v. State*, 1999 Miss. App. LEXIS 15 (Miss. Ct. App. Jan. 26, 1999), subst. op., 739 So. 2d 394, (Miss. Ct. App. 1999).

In a prosecution for rape, a delay of 150 days between arraignment and trial was not unreasonable where the delay was caused by two continuances, one of which was requested by the defense in order for it to complete psychological tests of the defendant and the other which was requested by the District Attorney because



there was no prosecutor available. *Davis v. State*, 406 So. 2d 795 (Miss. 1981), appeal dismissed, cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

In a prosecution for felonious possession of marijuana, the trial court erred in dismissing the indictments and discharging defendants on speedy trial grounds, where one delay was requested by the state after defendants filed on the day set for trial, without notice, a motion to quash the indictment because of alleged racial discrimination in the selection of the jury's foreman, where defendants requested one continuance, and where the state requested another continuance because of the absence of its expert witness; the delays, which were granted in the absence of any objection by defendants, were entered for good cause. *State v. Davis*, 382 So. 2d 1095 (Miss. 1980).

#### **11. —Due to court congestion.**

Taking into consideration the good cause delays due to crowded dockets supported by court order and the continuance granted the defense, no violation of the 270 day rule occurred. *Buggs v. State*, 738 So. 2d 1253 (Miss. Ct. App. 1999).

For speedy trial purposes, crowded docket will not automatically suffice to establish good cause for delay. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

Upon proper showing by State in response to defendant's timely motion to dismiss because of alleged 270-day violation, docket congestion can be proper basis for good cause when supported by facts of particular case. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

Defendant's statutory right to be tried within 270 days of arraignment was not violated, even though he was tried 370 days after his arraignment; "good cause" for delay arose from congested court docket in county in which defendant was tried, and defendant did not demand speedy trial until day his case was set for trial. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), reh'g denied, 691 So. 2d 1025 (Miss. 1996).

For purposes of determining whether defendant's statutory right to speedy trial

has been violated, crowded court dockets are good cause for delay only if court actually grants continuance on this basis. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

A trial court had good cause for granting a continuance from Monday, which was the 270th day of court, to Friday of that week due to the court's heavy docket, and therefore the 270-day rule under this section was not violated. *Carson v. State*, 607 So. 2d 1132 (Miss. 1992).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. *Adams v. State*, 583 So. 2d 165 (Miss. 1991).

A defendant's right to a speedy trial was violated where 301 days elapsed between the day of arraignment and the day of the trial, and the case was continued twice by court order stating that "all cases not otherwise disposed of are hereby ordered continued to the next regular term of court." Although docket congestion is "good cause" for delay in certain circumstances, the State never sought a continuance for this or any other reason, but instead relied on the "mass continuances" routinely made at the end of each court term. *Yarber v. State*, 573 So. 2d 727 (Miss. 1990).

#### **12. Length of delay.**

Defendant's statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 was not violated because the delays attributable to the state consisted of 268 days, which was within the 270-day statutory limit. *White v. State*, — So. 2d —, 2007

Miss. App. LEXIS 247 (Miss. Ct. App. Apr. 17, 2007).

In a case where there was a 580-day delay between arrest and trial, there was no violation of Miss. Code Ann. § 99-17-1 because 270 days had not passed between the arraignment and the trial. *Bonds v. State*, 938 So. 2d 352 (Miss. Ct. App. 2006).

Where defendant was arraigned for murder on August 28, 2002, and his trial did not begin until May 1, 2003, he was tried within 270 days of his arraignment, and his statutory right to a speedy trial was not violated. *Amos v. State*, 911 So. 2d 644 (Miss. Ct. App. 2005).

Time between defendant's arrest and trial amounted to 654 days, well in excess of eight months. The delay was presumptively prejudicial to the accused and sufficient to require application of the Barker factors; a balancing of the factors indicated that defendant was not denied his constitutional right to a speedy trial. *Bates v. State*, 886 So. 2d 4 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Defendant was not deprived of his right to a speedy trial as defendant was tried within 263 days of being arraigned. *Mayo v. State*, 886 So. 2d 734 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Defendant was not deprived of either his constitutional or his statutory right to a speedy trial as he entered his guilty plea and was convicted of a drug offense within seven months of his arraignment. *Campbell v. State*, 878 So. 2d 227 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's right to a speedy trial was not violated, as approximately 197 days elapsed between defendant's arrest and trial and that number was well below the statutory limit of 270 days, and the greatest part of the delay between the commission of the felony and trial was directly and solely the consequence of defendant's flight; therefore, defendant's counsel was not ineffective for failing to file a motion to dismiss based on speedy trial grounds. *Jackson v. State*, 864 So. 2d 1047 (Miss. Ct. App. 2004).

Where defendant was put on trial 182 days after her arraignment, there was no

violation of the 270-day rule found under Miss. Code Ann. § 99-17-1 (Rev. 2000). *Ginn v. State*, 860 So. 2d 675 (Miss. 2003).

Statutory speedy trial time period had not run, where defendant waived arraignment on November 9, 2000, and went to trial on June 25, 2001. *Felder v. State*, 831 So. 2d 562 (Miss. Ct. App. 2002).

Trial court did not err in denying petitioner's motion for postconviction relief where he failed to prove his assertions that he was denied his right to a speedy trial and that he received ineffective assistance of counsel; there was no evidence in the record of the starting date of petitioner's incarceration, but the record showed that 89 days elapsed between indictment and trial which the appellate court found was quite reasonable. *Hill v. State*, 827 So. 2d 743 (Miss. Ct. App. 2002).

The state was not required to show good cause for delay, and there was no violation of this section, where the defendant's trial commenced about 53 days after his arraignment. *Davis v. State*, 750 So. 2d 552 (Miss. Ct. App. 1999).

The defendant was entitled to have his case dismissed without prejudice to reindict where his trial was delayed for 273 days chargeable to the state due to poor docket management by the district attorney and circuit clerk's office. *Williams v. State*, 747 So. 2d 276 (Miss. Ct. App. 1999).

The defendant was brought to trial in less than 270 days where 425 days elapsed between arraignment and trial, but 176 days of delay were caused by continuances granted at her request. *Swindle v. State*, 755 So. 2d 1158 (Miss. Ct. App. 1999).

Delay of almost 26 months between indictment and trial warranted presumption of prejudice, thereby triggering inquiry into other constitutional speedy trial factors. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Delay in bringing defendant to trial in capital murder prosecution weighed heavily against defendant in constitutional speedy trial analysis where most



delay was due to defendant and where State made no deliberate attempts that could be considered as oppressive conduct to harm defense. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Defendant failed to show that he was prejudiced by any speedy trial violation in delay in bringing him to trial on charge of capital murder; defendant did not claim that, because of delay, witnesses scheduled to testify for defense disappeared or that any evidence was lost or destroyed, and there was no showing that defendant could not defend against charge or that State engaged in oppressive conduct. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

### 13. Demand for trial.

The defendant did not waive his right to a speedy trial where he filed a "Motion for Discovery/Speedy Trial Demand," notwithstanding that he did not compel a ruling on his motion until the morning of trial, at which time the trial court acknowledged the lateness of the hour for such motion. *Williams v. State*, 747 So. 2d 276 (Miss. Ct. App. 1999).

The defendant waived his right to complain about not being brought to trial within 270 days of arraignment where he sat idly by while the state went forward with one cause of action against him and did nothing to voice his objection to not being brought to trial on another cause of action against him; in addition, he neither attempted to or showed any prejudice to his defense caused by the delay. *Byrd v. State*, 741 So. 2d 1028 (Miss. Ct. App. 1999).

The court would reverse and remand to the trial court for a hearing to determine whether the defendant was prejudiced by the delay in his trial where (1) the delay between his arraignment and trial included 320 days that ran against the state, (2) there were no continuances on the record with regard to the overcrowded

docket and there was no evidentiary basis, such as the docket calendars, to support the exclusion of any of the delay due to an overcrowded docket, and (3) the defendant filed a motion to dismiss his indictment for failure to provide him a speedy trial well within the 270 day period. *Frazier v. State*, 739 So. 2d 443 (Miss. Ct. App. 1999).

Defendant's initial assertion of his right to speedy trial in his motion to dismiss for failure to transcribe some proceedings while defendant was represented by his original trial counsel was not equivalent of demand for speedy trial and, thus, dilatory assertion of right to speedy trial weighed against him in constitutional analysis. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

### 14. Guilty plea.

Defendant's entry of a plea of guilty acted as a waiver of any speedy trial claim, whether based on statutory or constitutional grounds. *Davidson v. State*, 850 So. 2d 158 (Miss. Ct. App. 2003).

Inmate's petition for post-conviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea he waived his constitutional and statutory rights to a speedy trial. *Turner v. State*, 864 So. 2d 288 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Where the defendant pled guilty before being arraigned, there was no violation of his statutory right to a speedy trial. Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Peacock v. State*, 783 So. 2d 763 (Miss. Ct. App. 2000).

### 15. Arraignment.

Miss. Code Ann. § 99-17-1 was not triggered in defendant's case because he was not arraigned nor did he ever explicitly waive arraignment. *McGee v. State*, 953 So. 2d 241 (Miss. Ct. App. 2005).



# RESEARCH REFERENCES

**ALR.** Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial-state cases. 78 A.L.R.3d 297.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 A.L.R.4th 899.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant. 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness. 55 A.L.R.4th 1196.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 1021 et seq.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss. L. J. 427, June, 1982.

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Imwinkelreid and Blinka, Criminal Evidentiary Foundations (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Perrin, Caldwell and Chase, The Art and science of Trial Advocacy (Anderson).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Federal Criminal Laws and Rules (Michie).

Mississippi Criminal and Traffic Manual (Michie).

## § 99-17-3. Peremptory challenges; number allowed.

In capital cases the defendant and the state shall each be allowed twelve peremptory challenges. In cases not capital the accused and the state each shall be allowed six peremptory challenges; but all peremptory challenges by the state shall be made before the juror is presented to the prisoner. In all cases the accused shall have presented to him a full panel before being called upon to make his peremptory challenges.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 8; 1857, ch. 64, art. 297; 1871, § 2761; 1880, § 3076; 1892, § 1423; Laws, 1906, § 1496; Hemingway's 1917, § 1254; Laws, 1930, § 1277; Laws, 1942, § 2520; Laws, 1908, ch. 172.

**Cross References** — Examination of jurors by parties or their attorneys, see § 13-5-69.

Defendants tried jointly must agree in the challenges made without cause and are entitled only to the number to which one defendant is entitled, see § 99-17-5.

Voir dire examination of jurors, see Miss. Unif. Cir. & County Ct. Prac. R. 3.05 and 10.01.

Number of peremptory challenges allowed, see Miss. Unif. Cir. & County Ct. Prac. R. 10.01.

## JUDICIAL DECISIONS

1. In general.
2. Challenge after acceptance.
3. Failure to exhaust peremptory challenges.
4. Prima facie showing of racial discrimination.
5. Applicability of Batson rule.
6. Loss of peremptory challenge.
7. Race-neutral reasons for challenge.
8. Increasing number of challenges.
9. Presentation of full panel required.
10. Time for challenge.

**1. In general.**

On review, the trial court's determinations under Batson are afforded great deference because they are, in large part, based on credibility; the appellate court will not reverse any factual findings relating to a Batson challenge unless they are clearly erroneous. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Mississippi Supreme Court has held that the trial judge is afforded great deference in determining if the expressed reasons for exclusion of a venire person from the challenged party is in fact race neutral. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

One of the reasons the trial court is granted such deference in a Batson issue is that the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality; the judge is in the best position to assess the overall credibility of the statements made in voir dire and by presenters of the peremptory strikes. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Because defendant's offenses were non-capital, the statutory provision of Miss. Code Ann. § 99-17-3 which provided extra peremptory challenges to the venire in capital cases were inapplicable and defendant was entitled only to the regular number of six peremptory challenges. *Miles v. State*, 864 So. 2d 963 (Miss. Ct. App. 2003).

Defendant failed to establish prima facie case of gender discrimination arising

from prosecution's exercise of seven peremptory challenges against females where percentage of female venire members struck was nearly equivalent to percentage of females in venire upon which prosecution passed with three peremptory strikes unused; ultimate composition of jury, with eight females, produced percentage of women higher than percentage of females on original venire. *Simon v. State*, 679 So. 2d 617 (Miss. 1996).

In order to prove that state used peremptory challenges in unconstitutional manner, defendant had to show that he was a member of cognizable racial group, that prosecutor exercised peremptory challenges to excuse venireperson of defendant's case, and that there was an inference that the venirepersons were excluded on account of their race; burden thereafter shifts to state to come forward with race-neutral explanation for challenging jurors, but prosecutor's explanation need not rise to level of challenge for cause. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant was not denied opportunity to intelligently use peremptory challenges when trial court conducted voir dire itself; trial court asked venire whether anyone would automatically vote for death penalty regardless of mitigating circumstances, counsel for both sides stated they were satisfied with voir dire, and defendant did not ask trial court to further voir dire jurors and did not ask that she be allowed to do so. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A defendant was not denied his right to use a peremptory challenge on a juror who

failed to answer the defense attorney's question during voir dire as to whether any of the jurors knew either attorney in the case, even though the juror had been injured when the defense attorney collided with him during a softball game 3 years earlier, where the juror did not recognize the defense attorney at the time of voir dire and only sometime thereafter recognized him as being the person who had collided with him at the ball game, the juror had not seen the defense attorney since that time, and the juror said that he felt no ill will toward the attorney for the injury he received and that the incident did not color his judgments during trial. *Bush v. State*, 585 So. 2d 1262 (Miss. 1991), opinion after remand, 597 So. 2d 656 (Miss. 1992).

State court's erroneous refusal to remove juror favoring death penalty, which refusal forces defense to use peremptory challenge, does not violate defendant's right to impartial jury or to due process. *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 11, 101 L. Ed. 2d 962 (1988).

Jury selection procedure provided in Circuit Court Rule 13, which requires that counsel for the defendant direct his questions on voir dire to the entire group of jurors presented, is not improper, so long as the defendant is given a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge a juror. *Peters v. State*, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

That, on the trial of the defendant charged with murder, the prosecuting attorney peremptorily excused two prospective jurors who on their voir dire examination had given equivocal answers regarding their attitude toward the imposition of capital punishment did not prejudice the defendant's rights. *Capler v. State*, 237 So. 2d 445 (Miss. 1970), vacated in part, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972), on remand, 268 So. 2d 338 (Miss. 1972).

Where on the trial of a homicide one of the jurors becomes insane it is the duty of the court to begin the trial de novo recon-

stituting the jury as a whole and giving him the right to all challenges he originally had. *Dennis v. State*, 96 Miss. 96, 50 So. 499 (1909).

## **2. Challenge after acceptance.**

In a prosecution for capital murder, the trial court erred in permitting the state to peremptorily challenge on juror after the panel had been accepted on the grounds that the juror's son was under indictment in a criminal matter where the record did not show that the juror was incompetent to serve and where the challenged juror could not be presumed to be incompetent merely because her son had been indicted; the trial court further erred by denying defendant's peremptory challenge to the alternate juror, where it seemed to discriminate against defendant in favor of the state. Fairness required that defendant be granted a new trial. *Caldwell v. State*, 381 So. 2d 591 (Miss. 1980).

On the trial for homicide, it was error to permit the state to peremptorily challenge one juror, after he had been accepted by the state, and a full panel tendered to defendant and to then refuse to permit defendant to peremptorily challenge another juror, who finally sat upon the trial jury, after he had been accepted by both the state and defendant, but before the final acceptance of the panel. *Cook v. State*, 85 Miss. 738, 38 So. 110 (1905).

## **3. Failure to exhaust peremptory challenges.**

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. *Shell v. State*, 554 So. 2d



887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Error of court in refusing to excuse jurors for cause in criminal case will not be considered on appeal where it appears from record that appellant used only five peremptory challenges and hence his peremptory challenges were not exhausted. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

#### 4. Prima facie showing of racial discrimination.

White defendant has standing to raise Batson challenge against exclusion of Black prospective jurors. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Trial court should have provided defense an opportunity to prove evidence of prima facie Batson violation in state's use of ten of its 12 peremptory challenges against Black prospective jurors; trial court erroneously held that white defendant did not have standing to raise Batson issue. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Under the Batson test, the prosecutor satisfied the burden of articulating a non-discriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), reh'g denied, 515 U.S. 1170, 115 S. Ct. 2635, 132 L. Ed. 2d 874 (1995), on remand, 64 F.3d 1195 (8th Cir. Mo. 1995).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia*

*Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Griffin v. State*, 607 So. 2d 1197 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised peremptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. *Govan v. State*, 591 So. 2d 428 (Miss. 1991).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

No prima facie case of racial discrimination was shown in the prosecution's use of peremptory challenges, even though the prosecutor exercised 5 of his 7 peremptory challenges against black jurors, where the victim of the crime charged and the defendant were black, the prosecutor and the defendant had several challenges left, numerous potential black jurors were left uncalled, and one black juror was in the jury box. *Dennis v. State*, 555 So. 2d 679 (Miss. 1989).

A defendant established a prima facie case of purposeful discrimination in the selection of a petit jury where he showed that he was a black person and that the

district attorney had exercised peremptory challenges to remove 5 black persons from the jury. The fact that the prosecution used all of the peremptory strikes necessary to remove all but one black person from the jury satisfied the requirement of raising an inference of racial discrimination. *Conerly v. State*, 544 So. 2d 1370 (Miss. 1989).

A black defendant made a prima facie showing of purposeful discrimination in the selection of a jury where the jury—including one alternate juror—was composed of 10 white persons and 3 black persons, and where the prosecution exercised 12 peremptory challenges, 7 of which were used to exclude black persons from the jury. *Chisolm v. State*, 529 So. 2d 630 (Miss. 1988).

When a criminal defendant establishes a prima facie case of the impermissible exclusion of black jurors through the use of peremptory challenges, the burden of proof shifts to the state to come forward with a racially neutral explanation for each of the challenges that must be related to the particular case being tried. *Dedeaux v. State*, 519 So. 2d 886 (Miss. 1988).

### 5. Applicability of Batson rule.

Where defendant's first trial resulted in a mistrial based on a Batson challenge, because the jury had not been sworn, the rules prohibiting double jeopardy were not violated; as such double jeopardy protection did not attach to defendant's first proceeding, so did not preclude a second trial. *Gaskin v. State*, 856 So. 2d 363 (Miss. Ct. App. 2003).

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. *Griffin v. State*, 610 So. 2d 354 (Miss. 1992).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. *Green v. State*, 597 So. 2d 656 (Miss. 1992).

White criminal defendant had standing to raise equal protection objection to prosecutor's allegedly race-based exercise of peremptory challenges to exclude black prospective jurors; same-race limitation on defendant's right to object would conform with neither substantive guarantees of equal protection clause and policies underlying federal criminal prohibition against discrimination in jury selection, nor accepted rules of third party standing to raise federal constitutional claim. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

### 6. Loss of peremptory challenge.

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

### 7. Race-neutral reasons for challenge.

Trial court properly sustained State's Batson objections to defendant's attempts to peremptory challenge jurors because he had a bad feeling about them based on their demeanor; defendant's reasons for exercising his challenges were not race-neutral. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Included among the reasons accepted as race neutral are: age, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in community, posture and demeanor indicating juror was hostile to being in court, juror was late, short term employment; the Mississippi Supreme Court has also accepted demeanor as a legitimate, race neutral basis for a peremptory challenge. *Murphy v. State*,



868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

State was required to present to trial court the race-neutral reasons for its peremptory challenges; race-neutral reasons were never presented to trial court and it never exercised its discretion in considering defendant's Batson challenge. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Batson hearing was necessary to elicit racially-neutral reasons from prosecutor for using ten of its 12 peremptory challenges against Black prospective jurors. *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

One factor in determining whether prosecutor's race-neutral explanation for challenge to juror is pretextual is relationship with the reason to the actual facts of the case. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's stated reason for peremptory challenge against juror, that juror stated that there was nothing she could do about the fact that her sister had been accused of but not charged with killing her brother and that the Lord would take care of it, was sufficiently related to murder prosecution so as not to be deemed pretextual, as her statement could be viewed as placing punishment of wrongdoer in the hands of the Lord. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's basis for peremptory challenge against juror, that defense counsel had stated "I love her to death," was sufficiently race-neutral. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory strike of black prospective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and had stated that she might have difficulty in coming to any definite conclusion. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

The reasons proffered by the State for using 5 of its 7 peremptory challenges



against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. *Henderson v. State*, 641 So. 2d 1184 (Miss. 1994).

Some acceptable race-neutral reasons for challenging a juror are: (1) involvement in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. *Harper v. State*, 635 So. 2d 864 (Miss. 1994).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was

unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." *Bradley v. State*, 562 So. 2d 1276 (Miss. 1990).

After the State has supplied a neutral nonracial explanation for peremptory challenges, in the absence of an actual proffer of evidence by the defendant concerning this issue, the Supreme Court may not reverse on this point. It is incumbent upon the defendant to come forward with proof when given the opportunity for rebuttal. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

Although a peremptory challenge cannot be exercised for a racially discriminatory reason, this does not preclude the exercise of a peremptory challenge for a non-race-based reason that objective and fair-minded persons might regard as absurd. *Chisolm v. State*, 529 So. 2d 635 (Miss. 1988).

#### **8. Increasing number of challenges.**

Use of the word "shall" in Miss. Code Ann. 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01 implies that the trial court has no discretion in the number of peremptory strikes given to each side; therefore, a trial court did not err by refusing to allow defendant additional peremptory strikes under § 99-17-3 and Rule 10.01 after five were denied due to an improper attempt to exclude Caucasian males from the jury in a statutory rape and sexual battery case. *Jones v. State*, 951 So. 2d 568 (Miss. Ct. App. 2006).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual

offender statute, Miss. Code Ann. § 99-19-83(3). *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Fact that 3 defendants were jointly tried did not operate to increase number of peremptory challenges; defendants charged with murder were entitled to 12 peremptory challenges because this was capital case, and received more than statutorily mandated number when trial court increased number of challenges for each side to 15 upon denying defendants' motion for 36 challenges. *Johnson v. State*, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

In a prosecution for carrying a concealed weapon after conviction of a felony which resulted in a life sentence under the habitual criminal statute, the defendant was not entitled to 12 peremptory challenges to the jury where the principal offense of carrying a concealed weapon was not a capital crime. *Osborne v. State*, 404 So. 2d 545 (Miss. 1981).

In a prosecution for capital murder, the defendant was not entitled to separate juries for the guilt and sentencing phases of his trial; since the same jury tried both phases of the trial, the defendant was only entitled to 12 peremptory challenges rather than the 24 he requested. *Tubbs v. State*, 402 So. 2d 830 (Miss. 1981).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under § 99-19-83, the defendant's demand

for a special venire under § 13-5-77 and for 12 peremptory challenges under this section was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; § 99-19-83 does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. *Yates v. State*, 396 So. 2d 629 (Miss. 1981).

### 9. Presentation of full panel required.

In a prosecution for murder in which defendant moved for a special venire, the trial court committed reversible error where, instead of filling the panel with members of that week's regular jury panel who were in the courtroom, it presented defendant with the 11 jurors who had been accepted by the State, and, over objection, required the defense to make its peremptory challenges to the 11 accepted jurors, in violation of statute mandating that in capital cases the defendant must be presented a full panel before being called upon to make his 12 peremptory challenges. *Sellen v. State*, 374 So. 2d 781 (Miss. 1979).

Provision in this section that the accused shall have presented to him a full panel before being called upon to make his peremptory challenges means that the accused must have 12 jurors presented to him, who have been accepted as jurors by the state, before he is required to challenge any of the jurors. *Peters v. State*, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

### 10. Time for challenge.

In prosecution for grand larceny of a bull, where defendant did not exercise any peremptory challenges when a full panel of twelve jurors was tendered to him in open court, and where he could not question or seek to question such jurors, the accused could not contend on appeal as to



the manner of selection of jury that required him to exercise peremptory challenges in secret conference, was prejudicial. *Hollis v. State*, 221 Miss. 677, 74 So. 2d 747 (1954).

In prosecution for murder where a juror was qualified and accepted by both parties and upon a full panel being tendered, refusing defense permission to peremptorily challenge the juror was not error. *Byrd v. State*, 179 Miss. 336, 175 So. 190 (1937).

Court properly refused to permit defendant to peremptorily challenge juror who had already been accepted by both state and defendant. *Dixon v. State*, 164 Miss. 540, 143 So. 855 (1932).

A defendant should withhold all peremptory challenges until presented with a full panel and should not interpose such a challenge on the overruling of a challenge for cause while the panel is incom-

plete. *Gammons v. State*, 85 Miss. 103, 37 So. 609 (1905).

Under this section [Code 1942, § 2520] the defendant is entitled to have presented to him a full panel of jurors all of whom have been accepted by the state. He may challenge any juror so presented and when the vacancies caused by his challenges are filled and the added jurors accepted by the state he may challenge any of the added jurors. *Funderburk v. State*, 75 Miss. 20, 21 So. 658 (1897).

A prisoner is entitled to have the jury panel filled by the state after he has refused any of the jurors tendered him before again exercising his right of peremptory challenge. *State v. Mitchel*, 12 So. 710 (Miss. 1893).

The peremptory challenge of a juror by the state after he has been presented to the prisoner is forbidden. *Stewart v. State*, 50 Miss. 587 (1874).

## RESEARCH REFERENCES

**ALR.** Peremptory challenge after acceptance of juror. 3 A.L.R.2d 499.

Use of peremptory challenge to exclude from jury persons belonging to a race or class. 4 A.L.R.2d 1200.

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. 21 A.L.R.3d 725.

Use of peremptory challenge to exclude from jury persons belonging to class or race. 79 A.L.R.3d 14.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 15.

Additional peremptory challenges because of multiple criminal charges. 5 A.L.R.4th 533.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent or punishment. 8 A.L.R.4th 149.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson state cases. 20 A.L.R.5th 398.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from

criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury—post-Batson federal cases. 110 A.L.R. Fed. 690.

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 206 et seq.

30 Am. Jur. Trials 561, Jury Selection and Voir Dire in Criminal Cases.

**CJS.** 50A C.J.S., Juries §§ 354 et seq.

**Law Reviews.** Note, Constitutional Law — Equal Protection Clause Bars Prosecutors' Peremptory Challenge Based Solely on Race, 7 Miss. C. L. Rev. 169, Spring, 1987.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1987 Mississippi Supreme Court Review, Peremptory challenges. 57 Miss. L. J. 497, August, 1987.

Note, Constitutional Law — Equal Protection Clause Bars Prosecutors' Peremptory Challenge Based Solely on Race, 7 Miss. C. L. Rev. 169, Spring, 1987.

Note, Beyond Batson: eliminating gender-based peremptory challenges. 105 Harv L Rev. 1920, June, 1992.



**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 6:13, 6:18.

Ward Wagner, Jr., Art of Advocacy Series: Jury Selection (Matthew Bender).

Perrin, Caldwell and Chase, Art and Science of Trial Advocacy (Anderson).

## § 99-17-5. Peremptory challenges; joint defendant must agree.

Defendants tried jointly must agree in their challenges made without cause, and shall be entitled to only the number to which one defendant is entitled.

**SOURCES:** Codes, 1880, § 3070; 1892, § 1419; Laws, 1906, § 1492; Hemingway's 1917, § 1250; Laws, 1930, § 1273; Laws, 1942, § 2516.

**Cross References** — Examination of jurors by parties or their attorneys, see § 13-5-69.

Number of peremptory challenges allowed, see § 99-17-3.

Voir dire examination of jurors, see Miss. Uniform Rules of Circuit and County Court Practice, Rules 3.05 and 10.01.

## JUDICIAL DECISIONS

### 1. In general.

State court's erroneous refusal to remove juror favoring death penalty, which refusal forces defense to use peremptory challenge, does not violate defendant's right to impartial jury or to due process. *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 11, 101 L. Ed. 2d 962 (1988).

Fact that 3 defendants were jointly tried did not operate to increase number of peremptory challenges; defendants charged with murder were entitled to 12 peremptory challenges because this was

capital case, and received more than statutorily mandated number when trial court increased number of challenges for each side to 15 upon denying defendants' motion for 36 challenges. *Johnson v. State*, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

The trial court in an armed robbery prosecution properly overruled the motion of defendants who were being tried jointly to be allowed 12 peremptory challenges to the jury panel in view of § 99-17-5. *Blanks v. State*, 451 So. 2d 775 (Miss. 1984).

## RESEARCH REFERENCES

**ALR.** Jury: Number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. 21 A.L.R.3d 725.

Use of peremptory challenge to exclude from jury persons belonging to class or race. 79 A.L.R.3d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black

Americans, from criminal jury—post-Batson state cases. 20 A.L.R.5th 398.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury—post-Batson federal cases. 110 A.L.R. Fed. 690.

**Am Jur.** 47 Am. Jur. 2d, Jury § 208.

30 Am. Jur. Trials 561, Jury Selection and Voir Dire in Criminal Cases.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1987 Mississippi Supreme Court Review, Peremptory challenges. 57 Miss. L. J. 497, August, 1987.

Note, Beyond Batson: eliminating gen-

der-based peremptory challenges. 105 Harv L Rev 1920, June, 1992.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:13.

Perrin, Caldwell and Chase, Art and Science of Trial Advocacy (Anderson).

## § 99-17-7. Interpreters.

In criminal cases wherein the defendant has been declared indigent, the court may appoint an interpreter who is certified as provided in Section 9-21-73, when necessary, sworn truly to interpret, and allow him a reasonable compensation, as set by the court, payable out of the county treasury.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(80); 1857, ch. 61, art. 158; 1871, § 640; 1880, § 1713; 1892, § 731; Laws, 1906, § 792; Hemingway's 1917, § 576; Laws, 1930, § 585; Laws, 1942, § 1529; Laws, 2000, ch. 389, § 1; Laws, 2006, ch. 569, § 7, eff from and after July 1, 2006.

**Amendment Notes** — The 2006 amendment rewrote the section to conform to the provisions of Laws of 2006, ch. 569, §§ 1 through 6, which are codified as §§ 9-21-71 through 9-21-81.

**Cross References** — Program for use of interpreters in all courts generally, see §§ 9-21-71 through 9-21-81.

Appointment of interpreter for the deaf in judicial proceedings and custodial situations, see §§ 13-1-301 et seq.

Appointment of counsel for indigents, see § 99-15-15.

## ATTORNEY GENERAL OPINIONS

A court has the obligation to appoint an interpreter when necessary in criminal cases to insure the defendant's due process rights, and the cost of the interpreter

may not be considered a cost of court payable by the defendant upon conviction or by the county upon acquittal. Aldridge, Jan. 25, 2002, A.G. Op. #02-0010.

## RESEARCH REFERENCES

**ALR.** Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification, for bias, of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant. 79 A.L.R.4th 1102.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant. 86 A.L.R.4th 698.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceeding is not proficient in the language used. 32 A.L.R.5th 149.

## § 99-17-9. Trial in the absence of accused.

In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or

bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

**SOURCES:** Codes, 1857, ch. 64, art. 303; 1871, § 2807; 1880, § 3075; 1892, § 1422; Laws, 1906, § 1495; Hemingway's 1917, § 1253; Laws, 1930, § 1276; Laws, 1942, § 2519; Laws, 2005, ch. 456, § 1, eff from and after July 1, 2005.

**Amendment Notes** — The 2005 amendment rewrote the section to revise the application of trial in the absence of the accused.

**Cross References** — Absence from state of person against whom cause of action has accrued as tolling time limited for commencement of action, see § 15-1-63.

## JUDICIAL DECISIONS

1. In general.
2. Presence of defendant waived.
3. Time to raise objection.
4. Warning.
5. Particular circumstances.

### 1. In general.

There is a long history of precedent for the constitutionality of trial in absentia under Miss. Code Ann. § 99-17-9. Being tried in absentia does not violate the United States Constitution. *Ali v. State*, — So. 2d —, 2004 Miss. App. LEXIS 1118 (Miss. Ct. App. Dec. 7, 2004).

The defendant's due process rights were not violated when he was tried in absentia on two traffic citations. *Wheeler v. Stewart*, 798 So. 2d 386 (Miss. 2001).

In the limited circumstance where the defendant, who is out on bond and represented by counsel, fails to appear at the commencement of his trial, but appears before any evidence is taken, he is not entitled to a new trial unless he shows prejudice resulting from his absence at the commencement of the trial. *Simmons v. State*, 1999 Miss. LEXIS 179 (Miss. May 13, 1999), subst. op., 746 So. 2d 302 (Miss. 1999).

When a motion for a new trial not considered by circuit judge during court term at which defendant was convicted, is considered by the judge of next trial term, the defendant should be present unless his presence is waived by his counsel. *Willette v. State*, 219 Miss. 793, 69 So. 2d 407 (1954).

This section [Code 1942, § 2519] merely gives the accused the privilege of waiving his presence at the trial. *Thomas v. State*, 117 Miss. 532, 78 So. 147, Am. Ann. Cas. 1918E,371 (1918).

This statute does not violate § 26 of the state constitution. *Williams v. State*, 103 Miss. 147, 60 So. 73 (1912).

An instance where the circuit court did not abuse its discretion in trying a defendant in his absence on a charge of selling intoxicating liquors. *Williams v. State*, 103 Miss. 147, 60 So. 73 (1912).

If an offender be tried in his absence he cannot, on a motion for a new trial, require that the state witnesses be compelled to reappear and repeat the testimony which they had given before the jury to enable him to make out a bill of exceptions. *Fugler v. State*, 58 Miss. 829 (1881).

### 2. Presence of defendant waived.

Testimony was offered by the State that indicated defendant was clearly aware of his trial date and defendant failed to contact his attorney or the court regarding his whereabouts; therefore, there was no error by the trial court in deciding to try defendant in absentia. *Williams v. State*, 881 So. 2d 963 (Miss. Ct. App. 2004).

Although the circuit court found that the justice court judge denied petitioner the constitutional right to counsel under Miss. Const. Art. 3, § 26 and the U.S. Const. Amend. VI, petitioner clearly had notice of the pending trial, petitioner and petitioner's attorney were aware that the



motion for continuance, which the trial court did not err in denying, had been denied; thus, the justice court judge did not err in proceeding to trial in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 and petitioner was not denied the constitutional right to counsel. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Circuit court erred in issuing a writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary and appeals from the justice court to the circuit court required a trial *de novo*, Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error pursuant to Miss. Code Ann. § 11-41-1. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Defendant's convictions for burglary and armed robbery were both proper where the trial court validly proceeded with the trial in defendant's voluntary absence because he was present at the commencement of trial and remained through the selection and swearing in of a jury. Brown v. State, 839 So. 2d 597 (Miss. Ct. App. 2003).

Trial court properly sentenced defendant in absentia following her conviction of selling cocaine as defendant had waived her presence by not appearing; even though defendant had not been present when the verdict was announced, her counsel had informed her of the conviction and instructed her to report to the sheriff the day prior to sentencing and, had she done so, she would have been aware of the sentencing date. Carmichael v. State, 832 So. 2d 568 (Miss. Ct. App. 2002).

Appellate courts have clearly established the constitutionality of trial in absentia, it was proper to continue a trial where the defendant has fled after trial has commenced. Jefferson v. State, 807 So. 2d 1222 (Miss. 2002).

Where accused felon was present at the preliminary hearing and was in the attorney's office in trial preparations the day before trial, but did not appear at commencement or other stages of trial, his presence at trial was not waived by his failure to appear. Mallard v. State, 798 So. 2d 539 (Miss. 2001).

If the defendant voluntarily absents himself from the trial at any point after the trial begins, the trial can go on in his absence, regardless of whether the defendant was in custody. McKnight v. State, 738 So. 2d 312 (Miss. Ct. App. 1999).

Statute governing trial in absence of accused does not offend dictates of State Constitution, which sets forth rights to confront accusers and to be present at trial. (Per Banks, J., with three Justices concurring and one Justice concurring in part. Jackson v. State, 689 So. 2d 760 (Miss. 1997).

Defendants did not waive right to be present at trial where defendants were not present at commencement of trial, since first defendant arrived at trial during cross-examination of state's second witness and second defendant arrived during selection of jury panel after voir dire was completed, and conducting of trial without such waiver was reversible error. Jackson v. State, 689 So. 2d 760 (Miss. 1997).

The presence of accused at the hearing of a motion for a new trial may be waived. Stokes v. State, 240 Miss. 453, 128 So. 2d 341 (1961).

Since the accused's absence from the anteroom where the attorneys exercised their challenges resulting in the final selection of jurors was voluntary, the accused's right to be present during that phase of the trial was waived, so that the trial court's overruling of a motion for mistrial was not reversible error, especially where no prejudice to defendant was alleged or shown. Brister v. State, 231 Miss. 722, 97 So. 2d 654 (1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069 (1958).

In murder trial where defendant was in custody he had right to waive his presence at the hearing of motion for new trial. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

In trial for misdemeanor, accused may, by his own fault or misconduct, waive his right to be present. *Jones v. State*, 204 Miss. 284, 37 So. 2d 311 (1948).

The presence of the accused may be waived even in capital cases. *Hamburg v. State*, 203 Miss. 565, 35 So. 2d 324 (1948).

Hearing of motion for a new trial in murder prosecution in absence of defendant in custody was not prejudicial where defendant's counsel waived his presence by failing to object to his absence and examining witnesses on behalf of defendant, and trial judge, aware of defendant's absence, in his discretion did not suspend proceedings. *Hamburg v. State*, 203 Miss. 565, 35 So. 2d 324 (1948).

Defendant held entitled to waive right to be present on hearing of motion for new trial in felony prosecution, where it was not shown that he was prejudiced thereby. *Odom v. State*, 172 Miss. 687, 161 So. 141 (1935).

One charged with murder may waive being present part of the time during the trial. *Winston v. State*, 127 Miss. 477, 90 So. 177 (1922).

### 3. Time to raise objection.

In murder trial defendant cannot claim error in that he was not present when motion for new trial was heard, where contention was neither mentioned to trial court, nor in assignment of errors nor in original brief, but was mentioned for first time in reply brief on appeal. *Sims v. State*, 209 Miss. 545, 47 So. 2d 849 (1950).

### 4. Warning.

Although the trial judge did not verbally warn a defendant that he would be removed from the courtroom for disruptive conduct, the defendant received adequate warning that he would be removed for continued disruptive conduct where he was removed after an initial outburst, he was allowed to cool down, and no proceedings were had in his absence. These occurrences amounted to a warning since the defendant was not unaware that his disruptive conduct was the reason for his first removal and that continued disruption would result in a second removal. *Bostic v. State*, 531 So. 2d 1210 (Miss. 1988).

### 5. Particular circumstances.

In his absence, defendant's trial counsel ably cross-examined a detective, made a continuing objection to the introduction of the videotaped interview, and made a closing argument which stressed defendant's theories of the victim's reasons to fabricate her testimony and of his own will being overborne during the interview with the detective. Also, the jury brought back a guilty verdict for only one of the two counts of sexual battery; therefore, defendant was not substantially prejudiced by his absence. *Baker v. State*, 930 So. 2d 399 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303 (Miss. 2006).

On the morning scheduled for defendant's DUI trial, defendant and his attorney were asked to return that afternoon; defendant did not return. The trial court did not err in trying defendant in absentia under Miss. Code Ann. § 99-17-9, because defendant's absence was willful, voluntary and deliberate; the jury was properly instructed not to make any assumptions regarding defendant's absence when considering his guilt or innocence. *Ali v. State*, — So. 2d —, 2004 Miss. App. LEXIS 1118 (Miss. Ct. App. Dec. 7, 2004).

Trial court did not abuse its discretion in requiring defendant to be present at trial even though defendant had a mental condition that was improved by in-patient treatment; the court rejected defendant's contention that the defense was prejudiced by defendant's appearance as a more "normal" person at trial. *Evans v. State*, 844 So. 2d 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

Defendant failed to clearly demonstrate an abuse of discretion in the trial court's denying his motion for continuance where there was a dispute between defendant and his counsel over whether defendant had notice of trial. *Stidham v. State*, 750 So. 2d 1238 (Miss. 1999).

Based on the facts that (1) the defendant was not present during at least a part of the state's questioning of potential jurors, (2) he did not willfully refuse to show up for trial in an effort to abuse the judicial system, and (3) the trial judge made extraneous comments in the presence of the jury that may have predis-



posed the jury against him from the very start, the defendant established that he was prejudiced and was entitled to a new trial. *Simmons v. State*, 746 So. 2d 302 (Miss. 1999).

The defendant was entitled to a new trial since he showed prejudice resulting from his absence at the commencement of his trial where (1) he was not present during at least a part of the state's questioning of potential jurors, (2) he did not willfully refuse to show up for trial in an effort to abuse the judicial system, and (3) the trial judge made extraneous comments in the presence of the jury that may have predisposed the jury against the defendant from the very start. *Simmons v. State*, 1999 Miss. LEXIS 179 (Miss. May 13, 1999), subst. op., 746 So. 2d 302 (Miss. 1999).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court abused its discretion by trying 2 defendants in absentia where the defendants were accused of felony possession of marijuana with intent to distribute, the defendants were released on bond, they did not appear at the commencement or at any other stage of the trial, the defense did not announce ready for trial, and the defense counsel's motion for a 30-day continuance based upon the defendants' absence was overruled and the trial was conducted without the defendants' presence. *Banos v. State*, 632 So. 2d 1305 (Miss. 1994).

A trial court abused its discretion by trying a defendant in absentia where the defendant was accused of felony possession of marijuana with intent to distribute, the defendant was released on a \$50,000 appearance bond following his arrest, he did not appear at the commencement or at any other stage of the trial, the defense did not announce ready for trial, and the defense counsel's motion for a trial continuance of one week was overruled and the trial was conducted as scheduled without the defendant's presence. *Sandoval v. State*, 631 So. 2d 159 (Miss. 1994).

The trial court did not abuse its discretion in ordering a murder trial to proceed in the defendant's absence where defendant, who was present in court when the trial began and the jury was examined, selected and sworn in, was in custody, within the meaning of this section, at the time he voluntarily left the courtroom and escaped. *McMillian v. State*, 361 So. 2d 495 (Miss. 1978).

Accused tried for misdemeanor in his absence when physically unable to attend trial is deprived of his constitutional right to be present, to be heard in his own behalf and to be confronted by witnesses against him. *Jones v. State*, 204 Miss. 284, 37 So. 2d 311 (1948).

Absence of accused from courtroom when order sustaining motion for special venire was entered, held harmless. *Ford v. State*, 170 Miss. 459, 155 So. 220 (1934).

Appellate court must presume adjudication to the effect that absent defendant was in default was based on facts then existing supporting judgment. *James v. State*, 155 Miss. 292, 124 So. 358 (1929).

Where an accused admitted to bail was present at the commencement of his trial but before its conclusion absented himself, the bond would be forfeited and judgment rendered in his absence. *Lavins v. State*, 3 So. 78 (Miss. 1887).

### ATTORNEY GENERAL OPINIONS

A defendant being tried for third offense DUI, for which jail time is mandatory, must have legal counsel or have made an intelligent waiver thereof; that such a defendant was not present would not

make a difference. O'Brien, Dec. 18, 1991, A.G. Op. #91-0930.

When defendant calls in to ask amount of fine for misdemeanor, Court may inform that person what fine will be in case



person is found guilty; if defendant does not appear at trial, he or she may be tried in absentia and final judgment and sentence be awarded as though such person were personally present in court. Blakney, July 2, 1992, A.G. Op. #92-0469.

If defendant fails to appear in traffic matter, he can be tried in his absence but burden of proving defendant guilty beyond reasonable doubt requires more than mere introduction of affidavit sworn to by law enforcement officer contained in uniform traffic ticket; there must be testimony in addition to affidavit and ticket. Shirley, Jan. 12, 1994, A.G. Op. #93-1012.

An individual may be tried in absentia for DUI. Belk, Jr., March 24, 2000, A.G. Op. #2000-0126.

An individual may be tried in absentia on a traffic ticket if the individual has been provided proper notice of the date for the appearance and trial and fails to appear or make other arrangements; however, the officer who wrote the ticket must also be present to testify about the offense as the traffic ticket alone is not sufficient to convict an individual of a traffic offense. Arnold, Jan. 11, 2002, A.G. Op. #01-0778.

## RESEARCH REFERENCES

**ALR.** Voluntary absence of accused when sentence is pronounced. 6 A.L.R.2d 997.

Power to try, in his absence, one charged with misdemeanor. 68 A.L.R.2d 638.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment. 69 A.L.R.2d 835.

Validity of jury selection as affected by accused's absence from conducting of pro-

cedures for selection and impaneling of final jury panel for specific cases. 33 A.L.R.4th 429.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 1126 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 2:2, 4:1.

## § 99-17-11. Only two counsel to a side heard.

Only two counsel for the state, one of whom shall be the district attorney, and two for the defendant, shall be heard in criminal cases, unless the court, for special reason, in its discretion, see fit to relax this rule.

**SOURCES:** Codes, 1857, ch. 64, art. 302; 1871, § 2806; 1880, § 3077; 1892, § 1424; Laws, 1906, § 1497; Hemingway's 1917, § 1255; Laws, 1930, § 1278; Laws, 1942, § 2521.

**Cross References** — Courts not permitting more than two attorneys to argue on one side in absence of good cause therefor, see § 11-49-9.

## JUDICIAL DECISIONS

### 1. In general.

This section [Code 1942, § 2521] has reference to argument of the case to the jury, and does not preclude the employment by interested persons of counsel to assist the district attorney, over defendant's objection. *Goldsby v. State*, 240 Miss. 647, 123 So. 2d 429 (1960), cert.

denied, 365 U.S. 861, 81 S. Ct. 829, 5 L. Ed. 2d 824 (1961).

The accused in a criminal trial has a right to the time necessary for making his defense fully and fairly, and the trial court has the power to prevent the abuse of such right by limiting the argument within reasonable bounds, but it should be exer-

cised with prudence and caution and the court should be too liberal, rather than unjust, to the accused. *Wingo v. State*, 62 Miss. 311 (1884).

### RESEARCH REFERENCES

**ALR.** Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case. 38 A.L.R.2d 1396.

### § 99-17-13. Variance between indictment and proof; amendment of record and indictment; continuance.

Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in the name of any county, city, town, village, division, or any other place mentioned in such indictment, or in the name or description of any person or body politic or corporate, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person, body politic or corporate, therein stated or alleged to be injured or damaged; or intended to be injured or damaged, by the commission of such offense, or in the Christian name or surname, or both, or other description whatever, of any person whomsoever, therein named or described, or in the ownership of any property named or described therein, or in the description of any property or thing, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on the merits, to order such indictment and the record and proceedings in the court to be amended according to the proof, whenever it may be deemed necessary by the court to amend such indictment, record, and proceedings, on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable. After such amendment, the trial shall proceed in the same manner, and with the same consequences in all respects, as if a variance had not occurred; but if the court shall, on application, refuse a continuance, the defendant may take a bill of exceptions thereto, and assign such refusal for error.

**SOURCES:** Codes, 1871, § 2799; 1880, § 3081; 1892, § 1435; Laws, 1906, § 1508; Hemingway's 1917, § 1266; Laws, 1930, § 1289; Laws, 1942, § 2532.

**Cross References** — Amendment of indictment or information in case of misnomer or dilatory plea, see § 99-7-19.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendment to affidavit, pleading, or proceeding brought up to circuit court from justice of the peace or municipal court, see § 99-35-11.

## JUDICIAL DECISIONS

1. In general.
2. Crime or offense charged.
3. Name.
4. —Of person charged.
5. —Of victim of crime.
6. —Of owner of property.
7. Miscellaneous.
8. Appropriateness of continuance.
9. Time for amendment and objection thereto.

**1. In general.**

In a forgery prosecution, the fact that the indictment charged that the defendant had intended to defraud certain persons doing business at a store, by the cashing of a forged check, while a witness on cross-examination remarked that the business was a corporation, did not constitute a material variance, for there was not even a remote chance that such inconsistency could result in subjecting the defendant to another prosecution. *Smith v. State*, 222 So. 2d 688 (Miss. 1969).

This section [Code 1942, § 2532] is not applicable where the indictment contains no allegation concerning the matter offered in evidence. *Langford v. State*, 239 Miss. 483, 123 So. 2d 614 (1960).

The constitutional provision requiring that an accused be advised of the offense charged, does not prohibit an amendment which does not deprive the accused of any substantial right necessary to the ends of justice. *Gillespie v. State*, 221 Miss. 116, 72 So. 2d 245 (1954).

Where an amendment to an indictment charging the receipt of stolen goods did not vary the description but merely supplemented it, the amendment did not constitute a new case or a new description which would prevent the accused from understanding the offense with which he was charged. *Jones v. State*, 215 Miss. 355, 60 So. 2d 805 (1952).

The state may amend an indictment so as to show correctly the style of the case referred to in the indictment. *Clanton v. State*, 210 Miss. 700, 50 So. 2d 567 (1951).

If the variance between the indictment and proof is not harmful to the defendant and the defendant has been informed by the indictment of the nature and cause of

the crime the variance is immaterial. *Sanders v. State*, 141 Miss. 289, 105 So. 523 (1925).

The statute is constitutional; it however confers a delicate power which should be employed cautiously with scrupulous regard to the defense on the merits, and on such terms as will preclude the possibility of harm. *Miller v. State*, 53 Miss. 403 (1876); *Peebles v. State*, 55 Miss. 434 (1877).

**2. Crime or offense charged.**

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of robbery, inasmuch as armed robbery is simply robbery with weapon. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

The State may amend an indictment during trial to change the offense, if the amended offense is a pure lesser included offense of the original indicted charge. *Holmes v. State*, 660 So. 2d 1225 (Miss. 1995).

An amendment may be made to state truly and describe accurately the particular and identical offense for which the grand jury indicted. *Gillespie v. State*, 221 Miss. 116, 72 So. 2d 245 (1954).

If a material element of the crime or a necessary negation be omitted, the indictment cannot by authority of the statute be amended so as to cure the defect. *Kline v. State*, 44 Miss. 317 (1870); *Kemp v. State*, 121 Miss. 580, 83 So. 744 (1920).

**3. Name.**

This section allows for the amendment of an indictment to change a name, so long as the defendant is not prejudiced and such variance is not material to the merits of the case. *Baldwin v. State*, 732 So. 2d 236 (Miss. 1999).



Amendment to an indictment, after state had closed its case in an uttering a forgery trial, to show that a named person was a part owner, instead of agent, of store which had received check, was one of form, not of substance, and would not support defendant's motion for a directed verdict. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

With respect to amendments seeking to change the name or description of a person to which the indictment refers, changes which conform the indictment so as to correctly name the person intended by the grand jury are allowable; however, if the amendment results in changing the identity of the person, so as to name a person other than the one intended by the grand jury, it is a substantive change and is not allowable. *Parchman v. State*, 279 So. 2d 602 (Miss. 1973).

No reversible error was committed by trial court in permitting the indictment to be amended by changing the first name of the alleged purchaser of marijuana without an order authorizing it actually being entered on the minutes of the court, where defendant failed to note any objection or complaint about the amendment during the trial and the record affirmatively showed the absence of any objection to the amendment as made. *Hammond v. Dubard*, 279 So. 2d 594 (Miss. 1973).

In prosecution for burglary, where defendant knew that the property he was charged with having stolen was a spool of barbed wire, an amendment to indictment inserting therein "USS Lyman" as part of the description of the wire instead of "J & L" as stated in the indictment, defendant was not injured or prejudiced by that amendment. *Andrews v. State*, 220 Miss. 28, 70 So. 2d 40 (1954).

If the question of variance between the indictment for uttering of a forgery and the proof for the reason that the indictment charges a different name from the proof offered, was raised in the lower court, the indictment could have been amended. *Kellum v. State*, 213 Miss. 579, 57 So. 2d 316 (1952).

Variance in indictment for perjury with proof as to issue between different parties would be amendable, and, after verdict

cured by statute. *Slade v. State*, 119 So. 355 (Miss. 1928).

Amending indictment for uttering forgery by changing name of payee of check to conform to proof held not error. *Graves v. State*, 148 Miss. 62, 114 So. 123 (1927).

#### 4. —Of person charged.

The defendant, W. J. Lee, was indicted under the name of W. L. Lee and the evidence clearly indicated that W. J. Lee was the person indicted and he was not misled by the error in his initials. The court held the error immaterial. *Lee v. State*, 138 Miss. 474, 103 So. 233 (1925).

An amendment may be made to an indictment so as to give the correct Christian name of the accused. *Smith v. State*, 103 Miss. 356, 60 So. 330 (1913).

Where an error as to the name of the defendant in an indictment is plainly apparent from its face being a mere clerical misprision, it may be amended by the district attorney without the consent of the grand jury of this section [Code 1942, § 2532]. *Orr v. State*, 81 Miss. 130, 32 So. 998 (1902).

Identity of name is not essential and amendments can be made therein, but identity of the offense and of the person is essential and cannot be amended. *Blumenberg v. State*, 55 Miss. 528 (1878).

#### 5. —Of victim of crime.

In a business burglary case, the indictment, despite misspelling the name of the store where the burglary took place, was sufficient. *Cridiso v. State*, 956 So. 2d 281 (Miss. Ct. App. 2006).

Changing the name of the victim or adding the name of the employer of the victim does not change the elements of grand larceny which the state has the burden of proving to obtain a conviction and, therefore, is only a matter of form. *Stradford v. State*, 771 So. 2d 390 (Miss. Ct. App. 2000).

A motion to amend the indictment to change the name of the victim from "Tom Seese" to "Tim Seese" was not a material variance on the face of the indictment when the amendment did not alter the criminal charge brought against the defendant. *Burks v. State*, 770 So. 2d 960 (Miss. 2000).

The trial court did not err when it allowed the state to amend the indictment in a murder prosecution to state the victim's actual name "a/k/a" his nickname, rather than stating just his nickname, since the defendant was not confused as to the identity of the person he was accused of killing and did not have to alter his defense. *Burson v. State*, 756 So. 2d 830 (Miss. Ct. App. 2000).

Amendment of indictment deleting from it name of one alleged victim was impermissible in that it went to substance rather than form, where by amendment state was allowed to delete essential element of crime which had chosen to prosecute. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

Ineffective amendment of indictment does not require reversal of conviction where multiple charges were submitted to jury and charges against defendant as to armed robberies of victims who were not deleted from indictment were separable from charge against victim who was deleted from indictment and court was of opinion that jury had not considered charge against deleted victim since juries are presumed to follow instructions given by trial judge. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

Amendment to an indictment changing the name of the victim from "Harmon" Rainey to "Grady" Rainey, was allowable where both Harmon and the county prosecutor testified that the grand jury intended to indict the defendant for shooting brother Grady and that the placing of Harmon's name on the indictment was a mistake. *Parchman v. State*, 279 So. 2d 602 (Miss. 1973).

Trial court did not commit reversible error in granting state's motion to amend an indictment, charging the accused with breaking and entering with a felonious intent to commit rape, to show that the female involved was another girl, who had the same surname but a different Christian name from that of the girl stated in the indictment. *McDole v. State*, 229 Miss. 646, 91 So. 2d 738 (1957).

Where an indictment which charged the defendant with murder incorrectly spelled the name of the deceased, it was proper for the court to sustain a motion of district

attorney for leave to amend the indictment so as to correctly spell the name of the deceased. *Belina v. State*, 228 Miss. 330, 87 So. 2d 919 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 233, 1 L. Ed. 2d 166 (1956).

Where there was a clerical mistake in an indictment for murder as to deceased's Christian name, permitting of the amendment of the indictment prior to trial did not prejudice the defendant inasmuch as the offense charged in the indictment was not changed. *Gillespie v. State*, 221 Miss. 116, 72 So. 2d 245 (1954).

Variance between indictment and proof of name of owner of stolen car was amendable at trial, where evidence clearly showed identity of offense charged would not have thereby changed. *Horn v. State*, 165 Miss. 169, 147 So. 310 (1933).

Amendment to indictment during trial to charge that "man" J. was killed instead of "Ernest" J., held permissible. *Davis v. State*, 150 Miss. 797, 117 So. 116 (1928).

An indictment for obtaining money under false pretense from partnership held not defective because alleging members of the partnership by initial preceding their surname, but if defect is made to appear to the court the names of partners can be written in by amendment. *State v. Grady*, 147 Miss. 446, 111 So. 148 (1927).

There is no variance between the proof and the indictment merely because the person killed has two names including the name alleged in the indictment. *Woulard v. State*, 137 Miss. 808, 102 So. 781 (1925).

A case where the name of the party defrauded may be changed by amendment. *McGuire v. State*, 91 Miss. 151, 44 So. 802 (1907).

An amendment is permissible as to the name of the murdered person. *Miller v. State*, 68 Miss. 221, 8 So. 273 (1890); *Thurmond v. State*, 94 Miss. 1, 47 So. 434 (1908).

An amendment is permissible as to the name of the injured party in prosecution for assault with intent to kill. *Miller v. State*, 53 Miss. 403 (1876); *Wood v. State*, 64 Miss. 761, 2 So. 247 (1887).

## 6. —Of owner of property.

The amendment of an indictment for burglary to conform to testimony concerning the owner of the property burglarized



was permissible. *Pearson v. State*, 740 So. 2d 346 (Miss. Ct. App. 1999).

The amendment of the original indictment, during the course of an armed robbery trial, to correct the corporate name of the owner of the robbed store was proper. *Evans v. State*, 499 So. 2d 781 (Miss. 1986).

An indictment for burglary may be amended before trial as to the ownership of the property. *Kelly v. State*, 239 Miss. 683, 124 So. 2d 840, 85 A.L.R.2d 1199 (1960).

Failure of an indictment charging embezzlement to allege the ownership of the embezzled property is not waived by failure to demur. *Langford v. State*, 239 Miss. 483, 123 So. 2d 614 (1960).

In a grand larceny prosecution for the theft of certain cattle, where a variance between the proof and indictment existed as to whether the cattle were owned by a partnership or corporation, the variance was an amendable defect. *Mills v. State*, 231 Miss. 641, 97 So. 2d 386 (1957).

Allowance of amendment to an indictment for burglary to show the name of the true possessor and operator of the warehouse and owner of the business, was a protection for the accused against another prosecution for the same crime. *Andrews v. State*, 220 Miss. 28, 70 So. 2d 40 (1954).

Where an indictment charged defendant with permitting gambling in a roadhouse of which he was the owner, an amendment eliminating the word "owner" and substituting therefor the word "occupant," was proper inasmuch as there was no change in the offense charged. *Hearn v. State*, 219 Miss. 412, 69 So. 2d 223 (1954).

In prosecution for grand larceny where the defendant pleaded not guilty, and where the indictment alleged stolen property to be personalty of Hattiesburg Hardware Stores, instead of that of a Mississippi corporation of like name, the indictment was not fatal where the accused made no request for directed verdict and made no suggestion of variance between the indictment and the proof, and did not file a demurrer to the indictment. *Wiggins v. State*, 215 Miss. 441, 61 So. 2d 145 (1952).

Failure of an indictment for burglary to contain the required allegation as to the

ownership of the property claimed to have been burglarized is not a variance, and so does not render applicable a statutory provision permitting an amendment to an indictment in the discretion of the court, whenever, on the trial of the indictment, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof. *Crosby v. State*, 191 Miss. 173, 2 So. 2d 813 (1941).

Variance in a prosecution for grand larceny between the indictment and proof as to the Christian name of the owner of the stolen property was waived where the defendant made no specific objection thereto at any stage of the trial but only sought to do so by peremptory instructions. *Saucier v. Life & Cas. Ins. Co.*, 189 Miss. 693, 198 So. 625 (1940).

Amendment of indictment during trial as to ownership of storehouse burglarized held permissible. *Osser v. State*, 165 Miss. 680, 145 So. 754 (1933).

In burglary prosecution, amendment of indictment to show correct name of corporation owning hotel burglarized, held permissible. *Wood v. State*, 155 Miss. 298, 124 So. 353 (1929).

In larceny prosecution, permitting premature amendment showing correct name of owner of calf stolen, held harmless. Amendment changing name of owner of stolen calf from L. H. to L. T. held permissible where evidence showed it was calf grand jury had in mind. *Collier v. State*, 154 Miss. 446, 122 So. 538 (1929).

Under an affidavit for maliciously shooting a horse belonging to one person it is error to amend so as to allege ownership in another person. *White v. State*, 95 Miss. 75, 48 So. 611 (1909).

The name of the owner of the property was amended in the following cases: *Haywood v. State* (1872) 47 Miss. 1; *Garvin v. State*, 52 Miss. 207 (1876); *Murrah v. State*, 51 Miss. 652 (1875); *Knight v. State*, 64 Miss. 802, 2 So. 252 (1887).

A new trial will not be granted for newly-discovered evidence that the property stolen was not as averred the property of "Lewis Thompson," but was the property of "Mrs. E. H. Tany," because if the fact had been proved the indictment could have been amended accordingly. *Foster v. State*, 52 Miss. 695 (1876).



## 7. Miscellaneous.

Where defendant was indicted for attempting to break and enter a dwelling house, the trial court committed reversible error by allowing the State to amend the indictment to change the charge from "attempt to break and enter" to "break and enter." Defendant was clearly prejudiced because the defense that he had actually completed the crime was no longer available to him. *Spears v. State*, 942 So. 2d 812 (Miss. Ct. App. 2005), rev'd, 942 So.2d 772 (Miss. 2006).

The trial court's failure to subsequently amend the indictment against the defendant to correct its erroneous assertion that the defendant sold drugs at a residence in the City of Sallis, Mississippi, when, in fact, his residence was in rural Attala County, worked no prejudice to the defendant and was, therefore, harmless. *Jenkins v. State*, — So. 2d —, 1999 Miss. App. LEXIS 301 (Miss. Ct. App. May 18, 1999), aff'd, 759 So. 2d 1229 (Miss. 2000).

The trial court committed reversible error by allowing the prosecution to circumvent the grand jury by amending the indictment in a prosecution for kidnapping to delete the word "secretly" from the phrase "with the intent to cause the victim to be secretly confined and held against her will" since such amendment deleted an element of the offense charged, and in the process omitted one of the defenses otherwise available to the defendant. Only the grand jury could make such a substantive change to the indictment. *Chevalier v. State*, 730 So. 2d 1111 (Miss. 1998).

The state was properly permitted to amend the murder indictment of the defendant to include the words "with design" since the offense for which the defendant was indicted was not changed by the amendment due to the express language of the statute; the offense was the same regardless of the defendant's intent. *Evans v. State*, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

An indictment's formal defect in failing to conclude with the words, "against the peace and dignity of the State of Mississippi," is curable by amendment; thus, such a defect is subject to waiver for the

failure to demur to the indictment in accordance with § 99-7-21. *Brandau v. State*, 662 So. 2d 1051 (Miss. 1995).

The word "distribute" includes transactions which are sales as well as transactions which may not be considered sales; thus, there was no material variance between an indictment and the evidence offered at trial where the defendant was indicted for distribution of a controlled substance and the proof evinced a sale of a controlled substance. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

In a prosecution for aggravated assault under § 97-3-7, the defendant's conviction would be reversed where the grand jury returned the indictment under § 97-3-7(2)(b), which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under § 97-3-7(2)(a), which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. *Quick v. State*, 569 So. 2d 1197 (Miss. 1990).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than § 99-19-83, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).

The amendment of an indictment during the course of an armed robbery trial to change the amount of the money stolen during the course of the robbery was one of form and not of substance, and was proper. *Evans v. State*, 499 So. 2d 781 (Miss. 1986).

In a prosecution for armed robbery, the trial court did not err in allowing the state to amend the indictment to change the amount from \$5,000 to \$1,700. This amendment was of form and not of substance, and was properly allowed under this section and Code 1972 § 99-7-21. *Sanders v. State*, 313 So. 2d 398 (Miss. 1975).

Variance was not fatal when considered with facts of case, where indictment alleged that defendant concealed a .22 caliber pistol, but proof showed that it was in fact a .25 caliber pistol. *Morgan v. United States Fid. & Guar. Co.*, 291 So. 2d 741 (Miss. 1974).

A trial court cannot amend an indictment so as to change the charge made in the indictment to another crime, except by the action of the grand jury who returned the indictment. *Jones v. State*, 279 So. 2d 650 (Miss. 1973).

Where an indictment originally charged the theft of a number of articles of personal property, and at the trial the district attorney asked leave to amend the indictment by eliminating all but four of the articles listed, and the accused claimed surprise and asked for a continuance on the ground that he had prepared to meet the indictment and had a witness who would testify that some of the articles eliminated by the amendment were not in fact stolen, the amendment was properly permitted and the motion for continuance was properly denied. *Stevens v. State*, 232 So. 2d 730 (Miss. 1970).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432 (Miss. 1968).

In prosecution for larceny of a calf, amendment of an indictment by the addition of "red" in the description of the calf is expressly authorized by this section [Code 1942, § 2532]. *Shipp v. State*, 215 Miss. 541, 61 So. 2d 329 (1952), but see

*Addikson v. State*, 608 So. 2d 304 (Miss. 1992).

Variance between charge of assault with brass knucks and proof of assault with crutch did not require amendment. *Roney v. State*, 153 Miss. 290, 120 So. 445 (1929).

An instance where an amendment may be made alleging the proper venue. *Winston v. State*, 101 Miss. 101, 57 So. 545 (1912).

Where an indictment for retailing charged defendant with selling to an individual named "and to divers other persons," the court was authorized to permit an amendment which erased the words quoted. *Rocco v. State*, 37 Miss. 357 (1859).

### 8. Appropriateness of continuance.

Trial court did not err in denying defendant a continuance in order to prepare a defense to the amended charge where there was no evidence that the defendant was prejudiced either by the amendment or by the refusal of the court to grant the continuance. *Hudson v. State*, 311 So. 2d 648 (Miss. 1975).

If a defendant does not ask for a continuance upon the amendment of the indictment, he cannot afterward object that he was surprised and prejudiced in his defense thereby. *Peebles v. State*, 55 Miss. 434 (1877).

### 9. Time for amendment and objection thereto.

An amendment to an indictment entered after the trial in vacation is a nullity. *Jones v. State*, 279 So. 2d 650 (Miss. 1973).

In an indictment for larceny of a cow where there is a variance between the indictment and the proof as to ownership of the cow objection should be made thereto specifically during the trial and after verdict it is too late to raise the objection. *Smith v. State*, 112 Miss. 248, 72 So. 929 (1916).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings, the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. *Wilkinson v. State*, 77 Miss. 705, 27 So. 639 (1900).



## RESEARCH REFERENCES

**ALR.** Necessity and materiality of statement of place of death in indictment or Information charging homicide. 59 A.L.R.2d 901.

Amendment of indictment or information with respect to name or capacity of

person alleged to have been victim of crime as ground for continuance. 85 A.L.R.2d 1204.

**Am Jur.** 41 Am. Jur. 2d, Indictments and Informations §§ 252 et seq.

## § 99-17-15. Variance between indictment and proof; amendment of record and indictment; order for amendment.

The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

**SOURCES:** Codes, 1880, § 3082; 1892, § 1436; Laws, 1906, § 1509; Hemingway's 1917, § 1267; Laws, 1930, § 1290; Laws, 1942, § 2533.

**Cross References** — Amendment of indictment or information in case of misnomer or dilatory plea, see § 99-7-19.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendment to affidavit, pleading or proceeding brought up to circuit court from justice of the peace or municipal court, see § 99-35-11.

## JUDICIAL DECISIONS

1. In general.
2. Entered on the minutes.
3. Failure to object.

### 1. In general.

An amendment to an indictment entered after the trial in vacation is a nullity. *Jones v. State*, 279 So. 2d 650 (Miss. 1973).

A trial court cannot amend an indictment so as to change the charge made in the indictment to another crime, except by the action of the grand jury who returned the indictment. *Jones v. State*, 279 So. 2d 650 (Miss. 1973).

Where an indictment charged defendant with permitting gambling in a roadhouse of which he was the owner an amendment eliminated the word "owner" and substituted therefor the word "occupant," and this amendment clearly showed the exact nature of the offense for

which defendant was being tried, as did the state's principal instruction, and jury had proper guide before it without a copy of order allowing the amendment, the attachment of the copy of the order allowing the amendment was not necessary. *Hearn v. State*, 219 Miss. 412, 69 So. 2d 223 (1954).

When order permitting amendment of indictment is made, it is unnecessary that trial be suspended until clerk records order on minutes. *Thomas v. State*, 167 Miss. 504, 142 So. 507 (1932).

### 2. Entered on the minutes.

Attempted amendment was ineffective where no valid order was entered on the record authorizing alleged amendment. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

An attempted amendment of an indictment charging defendant with uttering a



forged check to a division of a foreign corporation, in order to correctly list the corporation's name, was of no effect, since there was no order authorizing the amendment placed on the minutes of the court nor was the amendment made on the face of the indictment in compliance with this section; however, there was no variance between the indictment as it was originally drawn and the proof, since the identity of the company intended to be defrauded was clearly set forth and the identity of the foreign corporation of which it was a division was merely surplusage. *Sturgis v. State*, 379 So. 2d 534 (Miss. 1980), cert. denied, 449 U.S. 825, 101 S. Ct. 87, 66 L. Ed. 2d 28 (1980).

In a prosecution for grand larceny, where the testimony showed that a common carrier had the property in its possession for transportation from consignors to consignees who were the owners of the property, the freight line was a common carrier bailee in rightful possession of the property and there was no fatal variance between the proof and the indictment as originally written charging that the articles of personal property alleged to have been stolen were the property of the common carrier; therefore, the failure to write into the minutes the order of the trial court permitting the amendment of the indictment to allege that the personal property belonged to the main consignees was not fatal. *Mahfouz v. State*, 303 So. 2d 461 (Miss. 1974).

Where there was a variance between the indictment and proof in prosecution for receiving stolen property, and the trial judge sustained a motion for amendment of the indictment, but there was no written order for the amendment entered on the minutes, the variance was not eliminated by the action of the court in sustaining the motion. *Hitt v. State*, 217 Miss. 61, 63 So. 2d 665 (1953).

Where the order of the court allowing an amendment to the indictment was entered on the minutes, this effects precisely the amendment to be made, in a murder prosecution, the presumption was in the absence of a showing to the contrary, that the district attorney did not actually

amend the indictment until the order allowing him to do so had been entered on the minutes. *Holloway v. State*, 187 Miss. 238, 192 So. 450 (1939).

Amendment to indictment must be by order of court which must precisely specify amendment, and order must be spread on minutes. *Thomas v. State*, 167 Miss. 504, 142 So. 507 (1932).

Permitting prosecuting attorney to amend the indictment, during murder trial, by changing name of alleged deceased without order on minutes, held reversible error. *Davis v. State*, 150 Miss. 797, 117 So. 116 (1928).

An amendment to the indictment must be by order of the court entered on minutes and for an amendment otherwise made the indictment should be quashed. *Shurley v. State*, 90 Miss. 415, 43 So. 299 (1907).

An indictment changed by the prosecuting attorney without authority entered on the minutes of the court should be quashed. *Shurley v. State*, 90 Miss. 415, 43 So. 299 (1907).

### 3. Failure to object.

In a prosecution for manslaughter in which the trial court permitted the state to amend the face of the indictment by adding the word "Jr." to the name of the victim, any error was waived by the defendant where no point was made at that time to the trial judge that an order authorizing the amendment had not been placed on the minutes as provided by this section and where, in his motion for a new trial, the defendant had failed to assign this error. *Dunaway v. State*, 398 So. 2d 658 (Miss. 1981).

No reversible error was committed by trial court in permitting the indictment to be amended by changing the first name of the alleged purchaser of marijuana without an order authorizing it actually being entered on the minutes of the court, where defendant failed to note any objection or complaint about the amendment during the trial and the record affirmatively showed the absence of any objection to the amendment as made. *Hammond v. Dubard*, 279 So. 2d 594 (Miss. 1973).

## § 99-17-17. Joint defendants are competent witnesses for one another in separate trials.

Where parties jointly indicted are tried separately, the party not on trial, shall, in all cases, be a competent witness for the party being tried.

**SOURCES:** Codes, 1880, § 3071; 1892, § 1420; Laws, 1906, § 1493; Hemingway's 1917, § 1251; Laws, 1930, § 1274; Laws, 1942, § 2517.

**Cross References** — Severance of joint indictments in felonies, see § 99-15-47.

### JUDICIAL DECISIONS

#### 1. In general.

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25 felonies, and the other accomplice had entered a plea of not guilty to the charge

of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. *Wheeler v. State*, 560 So. 2d 171 (Miss. 1990).

### RESEARCH REFERENCES

**ALR.** Receiver of stolen goods as accomplice of thief for purposes of corroboration. 74 A.L.R.3d 560.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 A.L.R.4th 192.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial. 17 A.L.R. Fed. 249.

## § 99-17-19. Assaults; insulting words admissible.

In all trials for assault and battery, or for an assault, the defendant may give in evidence, in excuse or justification, any insulting words used by the person on whom the assault or assault and battery was committed, at the time of the commission thereof, toward the defendant, and the jury may consider and determine whether such words were or were not a sufficient excuse for or justification of the offense committed.

**SOURCES:** Codes, 1857, ch. 64, art. 366; 1871, § 2871; 1880, § 3080; 1892, § 1428; Laws, 1906, § 1501; Hemingway's 1917, § 1259; Laws, 1930, § 1282; Laws, 1942, § 2525.

**Cross References** — Insulting words as actionable, see § 95-1-1.  
Criminal offense of assault and battery generally, see §§ 97-3-7 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Insulting words as justification.
3. Punitive damages.

**1. In general.**

The statute applies to defense in civil as well as criminal prosecutions. *Choate v. Pierce*, 126 Miss. 209, 88 So. 627 (1921); *Holliman v. Lucas*, 202 Miss. 463, 32 So. 2d 259 (1947).

The plea of justification in an action for assault does not entitle the defendant to open and close the case before the jury. *Indianola Cotton Oil Co. v. Crowley*, 121 Miss. 262, 83 So. 409 (1920).

**2. Insulting words as justification.**

Insulting words can never justify a homicide, unless they are of such nature as to cause defendant to believe he is threatened with grave, impending danger. *Reed v. State*, 197 So. 2d 811 (Miss. 1967).

An instruction in an assault action as to the permissibility of a finding for plaintiff need not predicate absence of justification by insulting words where, under the evidence, justification is not an issue; nor need it exclude self-defense where the evidence shows that plaintiff was attacked by defendant while conversing with another. *Pittman v. Partin*, 236 Miss. 517, 111 So. 2d 238 (1959).

Right to strike one using insulting words is not given accused by this section [Code 1942, § 2525], but jury may consider and determine whether words used were or were not a sufficient excuse for or justification of offense committed. *Herron v. State*, 38 So. 2d 720 (Miss. 1949).

This statute places it within the right and province of the jury to determine whether or not the language employed against a defendant is a sufficient excuse or justification for committing an assault and battery without the use of a deadly weapon. *Holliman v. Lucas*, 202 Miss. 463, 32 So. 2d 259 (1947).

Whether this section [Code 1942, § 2525] is applicable in manslaughter cases will not be decided on assignment of error directed to instruction for state to effect that if jury believes from evidence that deceased cursed defendant, calling him vile names, defendant had right to

strike deceased, when accused procured another instruction properly submitting this issue but was convicted in spite of instruction. *Holliman v. Lucas*, 202 Miss. 463, 32 So. 2d 259 (1947).

Insulting words do not of themselves justify assault; a defendant must justify the assault by the words. *Baker v. State*, 192 Miss. 406, 6 So. 2d 315 (1942).

The gist of justification, caused by insulting words, is in the mind and reaction of the defendant, who must himself connect the incentive to the act to produce provocation. *Baker v. State*, 192 Miss. 406, 6 So. 2d 315 (1942).

The jury, in a prosecution on a charge of assault, may consider whether insulting words used were a sufficient justification, but only when given "in evidence in excuse or justification." *Baker v. State*, 192 Miss. 406, 6 So. 2d 315 (1942).

Where, in a prosecution on a charge of assault, the defendant testified that he struck the victim because "he had his hands behind him and advancing on me in a threatening manner," and did not claim to have struck him because of insulting remarks made by the victim, the defendant was not entitled to an instruction that under the law insulting words could justify an assault, and that if the jury had a reasonable doubt but that the victim applied to the defendant the term "you are a damn liar," and that such language justified an assault, then it was their duty to render a verdict of not guilty, such words not being given in evidence in justification, but being a mere incident of the assault. *Baker v. State*, 192 Miss. 406, 6 So. 2d 315 (1942).

Where prosecuting witness threatened to whip whoever took his automobile shift keys and defendant, convicted of assault, procured and returned keys, but refused to disclose who took them, stated that he would take it on himself, and asked what prosecuting witness was going to do about it, whereupon prosecuting witness struck defendant, defendant's statements did not constitute assault and did not make him the aggressor, as regards question of self-defense. *Herrington v. State*, 177 Miss. 837, 172 So. 129 (1937).



Under this section [Code 1942, § 2525] the jury has the right to determine whether the insulting words were sufficient excuse for the original assault and an instruction denying the jury this privilege is erroneous. *Wicker v. State*, 107 Miss. 690, 65 So. 885 (1914).

Under Code 1892, § 1428 [Code 1942, § 2525], the acceptance of a challenge to fight, and the voluntary engaging in a fight because of the challenge cannot be set up as a defense, for the defendant must show that he is without fault, and fighting under a challenge is unlawful and affords no justification. *Lizana v. Lang*, 90 Miss. 469, 43 So. 477 (1907).

An instruction that no language however insulting will justify an assault and battery is properly refused. *Barr v. State*, 21 So. 131 (Miss. 1897).

### 3. Punitive damages.

Where only hands and feet are used in an assault and battery committed in response to an irresistible impulse and righteous resentment of a gratuitous insult, punitive damages are unwarranted. *Holliman v. Lucas*, 202 Miss. 463, 32 So. 2d 259 (1947).

## RESEARCH REFERENCES

**ALR.** Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death. 25 A.L.R.2d 1215.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 77 et seq.

**CJS.** 6A C.J.S., Assault and Battery §§ 18, 19 et seq.

## § 99-17-20. Capital murder or other crimes punishable by death.

No person shall be tried for capital murder, or any other crime punishable by death as provided by law, unless such offense was specifically cited in the indictment returned against the accused by setting forth the section and subsection number of the Code defining the offense alleged to have been committed by the accused. The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused. Any conviction of the accused for an offense punishable by death shall not be valid unless the offense for which the accused is convicted shall have been set forth in the indictment by section and subsection number of the Code which defined the offense allegedly committed by the accused.

**SOURCES:** Laws, 1974, ch. 576, § 6(3); Laws, 1977, ch. 458, § 10, eff from and after passage (approved April 13, 1977).

**Cross References** — Construction of the terms “capital case,” “capital offense,” “capital crime,” and “capital murder,” see § 1-3-4.

What constitutes the offense of capital murder, see § 97-3-19.

Indictment for murder and manslaughter, see § 99-7-37.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

## JUDICIAL DECISIONS

1. In general.
2. Lesser included offense instructions.

**1. In general.**

Underlying felony that elevated defendant's crime to capital murder was identified in the indictment along with the section and subsection of the statute under which he was being charged; as such, it sufficiently informed him of the charges against him and was sufficient under Mississippi law. *Ross v. State*, 954 So. 2d 968 (Miss. 2007).

For purposes of this section, "capital murder" does not include deliberate design murder. *Campbell v. State*, 749 So. 2d 1208 (Miss. Ct. App. 1999).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

A capital murder indictment alleging that the murder was committed while the defendant was "engaged in the commission of the crime of robbery ..." gave the defendant sufficient notice of the nature and cause of the charges against him, even though the indictment did not specify the overt acts constituting the crime of robbery, where the indictment further read "contrary to and in violation of § 97-3-19(2)(e)," which is the statutory provision for capital murder, so that the indictment was in compliance with § 99-17-20. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

The indictment in a murder prosecution was not defective for failure to adequately describe and define the offenses charged where the statutory language used in the indictment adequately defined the offense so as to give the defendant fair notice of the crime charged in clear and intelligible language. *Bell v. State*, 360 So. 2d 1206 (Miss. 1978), cert. denied, 440 U.S. 950, 99 S. Ct. 1433, 59 L. Ed. 2d 640 (1979).

The statutory requirement that a crime punishable by death be specifically cited in the indictment was substantially com-

plied with in a rape prosecution, even though the indictment failed to include the words "as amended," after referring to the section and subsection of the rape statute. *Rhymes v. State*, 356 So. 2d 1165 (Miss. 1978).

Trial court in prosecution for capital murder committed during armed robbery properly refused to quash indictment, which failed to cite section and subsection of code defining offense as required by this section, where indictment was amended prior to trial so as to cite applicable statutory offense involved. *Bell v. State*, 353 So. 2d 1141 (Miss. 1977).

Defendant's indictment for murder was sufficient despite its failure to appraise him of whether he was charged under the capital murder section of the homicide statute [§ 97-3-19(2)] or under the section pertaining to murder [§ 97-3-19(1)], since, in light of the requirement of this section that one can only be tried for capital murder if such offense was specifically cited in the indictment, defendant could only have been charged with and convicted of murder, and since § 99-7-37, concerning requirements for indictments for homicide, does not require that the defendant be specifically appraised of whether he is being charged with murder or capital murder. *Varnado v. State*, 338 So. 2d 1239 (Miss. 1976).

**2. Lesser included offense instructions.**

In defendant's capital murder case, a trial court correctly rejected a lesser included murder jury instruction because there was too much probative evidence in the record of the underlying felony of robbery for a reasonable juror to find defendant guilty of simple murder beyond a reasonable doubt. There was evidence that he stole a sword because he was in possession of it after the victim's death, it had the victim's blood on it, and there was evidence that defendant not only stole the keys to the victim's truck, but also the truck. *Spicer v. State*, 921 So. 2d 292 (Miss. 2006).

## § 99-17-21. Bribery; certain proof not necessary.

Upon the trial of an indictment for bribery, it shall not be necessary to prove the conviction of any offender, for the offense in relation to which any agreement or understanding, prohibited by sections appearing in Title 97, Mississippi Code of 1972, dealing with bribery, shall have been made.

**SOURCES:** Codes, 1857, ch. 64, art. 42; 1871, § 2519; 1880, § 2735; 1892, § 1429; Laws, 1906, § 1502; Hemingway's 1917, § 1260; Laws, 1930, § 1283; Laws, 1942, § 2526.

**Cross References** — Bribery offenses in connection with medicaid benefits, see § 43-13-207.

Bribery of meat inspection officers, see § 75-35-29.

Bribery and influence of legislative power, see §§ 97-7-53 et seq.

Criminal offenses of bribery affecting administration of justice, see §§ 97-9-5 through 97-9-10.

Criminal offenses of bribery involving public or private officers, agents or trustees, see §§ 97-11-11, 97-11-13.

### RESEARCH REFERENCES

**ALR.** Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe. 20 A.L.R.2d 1012.

**Am Jur.** 37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

## § 99-17-23. Dueling; offender compelled to testify against another.

If any person offend against any of the provisions of Sections 97-39-1 to 97-39-11, Mississippi Code of 1972, headed Dueling, such person shall be a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence in the same manner as other witnesses; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony; and the fact that he testified thereof shall be a bar to any prosecution against him for such transaction.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 9(6); 1857, ch. 64, art. 55; 1871, § 2535; 1880, § 2751; 1892, § 1430; Laws, 1906, § 1503; Hemingway's 1917, § 1261; Laws, 1930, § 1284; Laws, 1942, § 2527.

### RESEARCH REFERENCES

**ALR.** Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

**Lawyers' Edition.** Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.



## § 99-17-25. Gambling and futures contracts; state not confined to proof of single violation.

On the trial of all indictments for gambling or gaming or operating a bucket-shop or dealing in contracts commonly called "futures," the state shall not be confined in the proof to a single violation, but under the indictment charging a single offense may give in evidence any one or more offenses of the same character committed anterior to the day laid in the indictment and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not be again liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment.

**SOURCES:** Codes, 1857, ch. 64, § 33, art. 148; 1871, § 2611; 1880, § 2857; 1892, § 1431; Laws, 1906, § 1504; Hemingway's 1917, § 1262; Laws, 1930, § 1285; Laws, 1942, § 2528.

**Cross References** — Gambling and futures contracts generally, see §§ 87-1-1 et seq.

Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

### JUDICIAL DECISIONS

#### 1. In general.

In prosecution of seven defendants for being interested in gambling table, evidence as to gaming on occasions subsequent to first occasion admitted when all defendants but one participated in furtherance of game held not admissible, where evidence as to subsequent occasions disclosed separate offenses in commission of which some of the defendants did not participate. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

This section [Code 1942, § 2528] does not aid an indictment for gaming charging

a number of defendants with individual offenses or authorize the conviction of a number of persons indicted jointly for gambling upon proof of individual offenses committed by them separately. *Howard v. State*, 83 Miss. 378, 35 So. 653 (1904).

Under the statute a conviction for the particular offense charged does not confer immunity for similar offenses committed prior to the time laid in the indictment unless evidence thereof were adduced on the trial. *Pope v. State*, 63 Miss. 53 (1885).

### RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Gambling §§ 240 et seq.

**CJS.** 38 C.J.S., Gaming §§ 84 et seq.

## § 99-17-27. Gambling and futures contracts; witness compelled to testify; immunity granted; penalty for refusing.

No person shall be excused from attending and testifying before a grand jury, or before any court, or in any cause or proceeding, criminal or otherwise based upon or growing out of any alleged violation of the provisions of law as to gambling or gaming, or as to operating a bucket-shop, or the dealing in contracts commonly called "futures," of which he shall have knowledge, on the

ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the grand jury or any court; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 11(6); 1857, ch. 64, art. 150; 1871, § 2613; 1880, § 2860; 1892, § 1432; Laws, 1906, § 1505; Hemingway's 1917, § 1263; Laws, 1930, § 1286; Laws, 1942, § 2529; Laws, 1912, ch. 261.

**Cross References** — Gambling and futures contracts generally, see §§ 87-1-1 et seq.

Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

## JUDICIAL DECISIONS

### 1. In general.

Where trial court quashed an indictment against defendants on the ground that they had testified before the grand jury under such circumstances as to render their action in so doing not altogether voluntary, the supreme court in affirming the judgment in that the defendants were immune from prosecution under the indictment returned by that grand jury, did not hold that the defendants would be immune from prosecution under indictment by some other grand jury before whom they may not appear as witnesses to testify. *State v. Milam*, 210 Miss. 13, 49 So. 2d 806 (1951).

This section [Code 1942, § 2529] was enacted with the idea that a grant of complete immunity was necessary to the compelling of a person to testify or to produce his books, papers and effects, which might have a tendency to incriminate him, or to furnish a link in a chain of evidence that would establish a crime on his part. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

This statute is remedial in its nature and should be liberally construed in the giving of complete immunity from prosecution to a person whose constitutional rights may be affected. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

The grand jury had no power to indict a defendant for a crime established by defendant's books, papers and effects obtained under a writ of duces tecum. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

The immunity from prosecution because of production of one's books and papers was not affected by the fact that the subpoena duces tecum to secure such documentary matter was issued and served upon his secretary. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

The court will not examine the proceedings of the grand jury merely to see whether they acted on competent evidence, or whether it was legal, or in regard to the relevancy or legality of the testimony given before them, but, the court, on proper proceedings, may inquire

into the legality of their action and afford to the party affected the necessary remedy to protect him against illegal acts. *State v. Bates*, 187 Miss. 172, 192 So. 832 (1940).

It is error to refuse a defendant on trial on a charge of gambling an instruction relating to the right of a jury to consider in

determining the interest of a witness the fact that the witness secured immunity by testifying for the state under the provisions of this section [Code 1942, § 2529]. *Howard v. State*, 83 Miss. 378, 35 So. 653 (1904).

## RESEARCH REFERENCES

**ALR.** When is federal prosecutor bound by promises of immunity or plea bargains made by another federal agent. 55 A.L.R. Fed. 402.

**Lawyers' Edition.** Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

### § 99-17-29. Lotteries; purchaser of ticket compelled to testify against seller.

The purchaser of any lottery ticket, or device in the nature of a lottery ticket, shall be a competent witness against the person from whom the same was purchased, and may be compelled to testify, but shall thereby be exempted from prosecution for buying or having the same.

**SOURCES:** Codes, 1871, § 2735; 1880, § 2979; 1892, § 1434; Laws, 1906, § 1507; Hemingway's 1917, § 1265; Laws, 1930, § 1288; Laws, 1942, § 2531.

**Cross References** — Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

## RESEARCH REFERENCES

**ALR.** Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

**Lawyers' Edition.** Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

### § 99-17-31. Offenses affecting legislature; witness denied privilege against self-incrimination.

Upon the trial of a person charged with any of the crimes named and defined in Sections 97-7-45 through 97-7-57, Mississippi Code of 1972, relating to offenses affecting the legislature, a person otherwise competent as a witness shall not be excused from testifying as such concerning the offense charged on the ground that such testimony might criminate him or subject him to public infamy; but such testimony shall not afterward be used against him in any criminal prosecution, except for perjury in giving such testimony, nor shall the punishment of any person for the acts which constitute a violation of either of the said sections by the legislature, or either house thereof, as for a contempt, bar or preclude prosecutions thereunder.



**SOURCES:** Codes, 1892, § 1433; Laws, 1906, § 1506; Hemingway's 1917, § 1264; Laws, 1930, § 1287; Laws, 1942, § 2530; Laws, 1912, ch. 261.

**Cross References** — Witnesses before the Legislature not liable to prosecution in certain cases, see § 5-1-25.

## RESEARCH REFERENCES

**Lawyers' Edition.** Adequacy, under granted in lieu of privilege against self-Federal Constitution, of immunity incrimination. 32 L. Ed. 2d 869.

### § 99-17-33. Perjury; no variance between "sworn" and "affirmed."

In prosecutions for perjury, where the indictment charges that the defendant was duly sworn at the time he is averred to have testified falsely, it shall not be a variance if the proof show he was affirmed, and vice versa.

**SOURCES:** Codes, 1857, ch. 64, art. 204; 1871, § 776; 1880, § 1605; 1892, § 1437; Laws, 1906, § 1510; Hemingway's 1917, § 1268; Laws, 1930, § 1291; Laws, 1942, § 2534.

**Cross References** — Term "oath" as including word "affirmation," see § 1-3-35.

A definition of term "sworn," see § 1-3-53.

Criminal offense of perjury, see §§ 97-9-59 et seq.

### § 99-17-35. Instructions to jury.

The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused," as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(144); 1857, ch. 61, art. 161; 1871, § 643; 1880, § 1714; 1892, § 732; Laws, 1906, § 793; Hemingway's 1917, § 577; Laws, 1930, § 586; Laws, 1942, § 1530.

**Cross References** — Judge not to sum up or comment or charge jury, see § 11-7-155.

Statutory jury instructions in capital cases, see § 99-19-103.

Jury instructions, see Miss. Unif. Cir. & County Ct. Prac. R. 3.07.

Time requirements for filing requested instructions and specific objections to instructions, and instructions in circuit courts generally, see Miss. Unif. Cir. & County Ct. Prac. R. 3.07.

Jury taking the instructions into the jury room, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

## JUDICIAL DECISIONS

1. Power of court in general.
2. Testimony of judge.
3. Requested instructions in general.
4. Oral instructions.
5. Time for instructions.
6. Construction of instructions as a whole.
7. Applicability and responsiveness to evidence.
8. —Murder or homicide cases.
9. Applicability to issues.
10. Assumption of facts.
11. Conflicting and inconsistent instructions.
12. Invasion of province of jury.
13. Comment on evidence.
14. Weight of evidence.
15. Undue prominence to particular matters.
16. Instructions as to more than one theory.
17. Peremptory instruction.
18. Modification of withdrawal.
19. Cure of error.
20. Subject matter of instructions.
21. —Definition and description of crime; murder or homicide cases.
22. — —Other cases.
23. —Lesser crimes.
24. —Credibility of witnesses, generally.
25. —Credibility of prosecuting witness.
26. —Credibility of accused.
27. —Credibility of accomplice.
28. —Circumstantial evidence.
29. —Reasonable doubt; murder or homicide cases.
30. — —Other cases.
31. —Self-defense, generally.
32. —In murder or homicide cases.
33. — —In other cases.
34. —Defense of another.
35. —Burden of proof.
36. —Presumptions, generally.
37. —Presumption of innocence.
38. —Dying declaration.
39. —Punishment.
40. —Miscellaneous.
41. — —Homicide cases.
42. — —Assault cases.
43. — —Larceny, robbery, burglary, or stolen property cases.
44. — —Other cases.
45. Review.

**1. Power of court in general.**

Trial court had the authority under Miss. Unif. Cir. & County Ct. Prac. R. 3.10 to give the jury supplemental instructions, and the trial court did not err in giving the jury an additional instruction on voluntary intoxication as a defense or in rereading the murder and manslaughter instructions to the jury, nor did the court find any violation of Miss. Code Ann. § 99-17-35; the intoxication instruction was necessary in order to guide the jury in making an informed decision on defendant's guilt, and the court found no harm emanating from the trial judge's rereading of the murder and manslaughter instructions. *Thornton v. State*, 841 So. 2d 170 (Miss. Ct. App. 2003).

While the statute does say the clerk of the court should mark the instructions as given or refused, nothing in the statute prohibits the circuit judge, as the presiding authority at the trial, from so marking the instructions. *Trull v. State*, 811 So. 2d 243 (Miss. Ct. App. 2000).

Defendant is entitled to submit instructions that present her theory of the case to jury, while trial judge is entitled to refuse instructions that incorrectly state the law, are without foundation in evidence or are stated elsewhere in other instructions. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

The trial judge did not err in not restructuring the jury after the judge sent the jury back to the jury room for further deliberations when it reported that it was unable to reach a verdict. *Harrison v. State*, 520 So. 2d 1352 (Miss. 1987).

It is the duty of the trial judge to instruct the jury, and not the duty of the district attorney. *Clemons v. State*, 320 So. 2d 368 (Miss. 1975).

This section contravenes the constitutional mandate imposed upon the judiciary for the fair administration of justice insofar as the phrase "at the request of either party" prohibits a judge from instructing a jury as to the applicable law of the case; this section shall be applied with the indicated unconstitutional phrase deleted; the trial judge may initiate and give appropriate written instructions in addi-

tion to the approved instructions submitted by the litigants if he deems the ends of justice so require, but the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

Although the trial court cannot give instructions on its own and is under no obligation to modify or correct a defective instruction, it must refuse instructions which do not correctly state the principles of law applicable to the facts in a particular case. *Jolly v. State*, 269 So. 2d 650 (Miss. 1972).

A trial judge may withdraw a previously granted instruction during closing arguments. *Deaton v. State*, 242 So. 2d 452 (Miss. 1970).

However, if the trial judge were to interpose an objection to evidence on behalf of the defendant in criminal cases, he would often severely interfere with the defendant's counsel in his effort to develop trial strategy and would possibly do the defendant more harm than good. *Mixon v. Black*, 198 So. 2d 213 (Miss. 1967).

The circuit judge cannot originate instructions or give them on his own motion. *Gangloff v. State*, 232 Miss. 395, 99 So. 2d 461 (1958).

The mere fact that two instructions given for the state in a prosecution for burglary and larceny were not numbered did not render them void. *Spiers v. State*, 229 Miss. 663, 91 So. 2d 844 (1957).

The presiding judge is the source from which the law touching the case is to be supplied and he cannot of his own motion give any instruction whatever. Those given must be in writing and at the request of the party. *Bangs v. State*, 61 Miss. 363 (1883).

A circuit judge is denied the power of originating instructions not called for or rendered necessary by those required by counsel. *Watkins v. State*, 60 Miss. 323 (1882).

## 2. Testimony of judge.

Under this section [Code 1942, § 1530], a trial judge in a criminal prosecution cannot testify as a witness upon the merits in direct contradiction of defendant's testimony. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

A trial judge may not testify as a witness upon the merits of the controversy, especially where the trial is by jury and there is only one judge presiding, the functions of judge and witness being incompatible. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

If a judge has notice that he will be called as a witness, he should arrange for someone to try the case, and if he has not sufficient notice to make such arrangement, then he should refuse to testify as a witness in the case. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

Failure to object in advance to the trial judge's testifying as a witness will not preclude appellate review of the propriety of such procedure where immediately thereafter counsel moved that the evidence be stricken and, if not, for a mistrial. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

## 3. Requested instructions in general.

Defendant's requested instruction regarding his theory of the case, which was that he did not participate in drug transaction but rather was used as decoy, was adequately covered by instructions precluding jury from finding defendant guilty unless it determined that defendant participated in the transaction, and thus, defendant was not entitled to requested instruction. *Triplett v. State*, 672 So. 2d 1184 (Miss. 1996).

Where instructions requested by defendant are in improper form and are the only ones embodying legally correct theory of defendant's defense, it is the duty of the trial court to see that instructions are placed in proper form for submission to jury. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

The failure of a trial court in a capital murder prosecution to grant the defendant an instruction embodying his theory of defense constituted reversible error where the defendant's testimony established an evidentiary predicate for the defenses contained in his requested instructions, and the proffered instructions were the only ones presenting his theories of defense; if the requested instructions were in improper form, it was the duty of the trial court to see that they were placed



in proper form for jury submission. *Hester v. State*, 602 So. 2d 869 (Miss. 1992).

Where a party offers evidence sufficient that a rational jury might find for him or her on the particular issue, that party of right is entitled to have the court instruct the jury on that issue and through this means submit the issue to the jury for its decision. The instruction may be denied only if the trial court can find, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn from the evidence in favor of the accused, that no hypothetical reasonable jury could find the fact as the accused suggests. Where a party is entitled to have an issue submitted to the jury through a viable instruction from the court, and where the instruction is denied, the error is not cured by the fact that the lawyer is nevertheless allowed to argue the point. *Anderson v. State*, 571 So. 2d 961 (Miss. 1990).

A trial judge's decision to strike a portion of a jury instruction requested by the defendant was not erroneous, even though the deleted portion was a correct statement of the law, since the deleted portion merely clarified the portion which was granted, and trial judges are "not required" to grant repetitious instructions. *Davis v. State*, 568 So. 2d 277 (Miss. 1990).

When a defendant's requested instruction is a proper statement of the law and is the only instruction that presents his or her theory of the case, it should be granted. *Murphy v. State*, 566 So. 2d 1201 (Miss. 1990).

In a prosecution for possession of marijuana with intent to sell, the circuit court's acceptance of its own 2 proposed instructions and the 4 instructions proposed by the prosecution, and its refusal of 9 of the defendant's 10 requested instructions, did not constitute reversible error where the judge refused the defendant's proposed instructions because they were "repetitious" of those which had already been accepted. *Hemphill v. State*, 566 So. 2d 207 (Miss. 1990).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a

jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

The trial court, in a homicide prosecution, did not err in refusing defendant's instruction on the disparity in age, size and strength between the deceased and defendant, which was stated in terms of what the evidence showed rather than what the jury believed from the evidence. *Brister v. State*, 231 Miss. 722, 97 So. 2d 654 (1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069 (1958).

Where a defendant's failure to secure an instruction on the disparity in age, size and strength between deceased and the defendant was brought about by his refusal to accept the trial court's suggested modification in the instruction, which was correct, the defendant could not complain on appeal. *Brister v. State*, 231 Miss. 722, 97 So. 2d 654 (1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069 (1958).

A defendant, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions which told the jury that in order to convict they needed only to believe defendant guilty beyond every reasonable doubt, could not complain that no instruction contained the necessary qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence, where the trial court was not requested to give such an instruction. *Poole v. State*, 231 Miss. 1, 94 So. 2d 239 (1957).

Refusal to grant instruction in murder prosecution is not prejudicial error when the only part of the requested instruction which had not been covered by others was statement that indictment in case is no evidence of guilt, and no miscarriage of justice resulted. *Howze v. State*, 43 So. 2d 191 (Miss. 1949).

Refusal to grant instructions requested by accused in criminal case is proper when

requested instructions do not state correct principles of law applicable to case and requested instruction is merely cumulative, same principles of law having been given in other instructions. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

In prosecution for murder, refusal of court to grant accused requested instruction is not error when other instructions granted accused embrace everything that is valid in the instruction refused. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

Accused in murder prosecution who has requested and been granted instruction limiting jury to verdict of guilty of murder or acquittal cannot complain of instruction given at request of state because it limited jury to murder or acquittal. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

In murder prosecution, trial court has no duty to give any instructions not requested. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949).

Giving of instructions on behalf of state and refusal of instructions requested by defendant is not error when the jury is fully and correctly instructed as to applicable principles of law by which guilt or innocence of accused is to be determined. *Bramlett v. State*, 37 So. 2d 305 (Miss. 1948).

Failure to instruct the jury on the joint trial of two defendants as to the right to convict one and acquit the other is not error where such instruction is not requested. *Davis v. State*, 200 Miss. 514, 27 So. 2d 769 (1946).

Court is not in error for failing to give instructions not requested by either party, and has no power to give instructions on its own initiative. *Cosey v. State*, 161 Miss. 747, 138 So. 344 (1931).

All instructions to the jury must be given by the court on written request. *Canterberry v. State*, 90 Miss. 279, 43 So. 678 (1907); *Harvey v. State*, 95 Miss. 601, 49 So. 268 (1909); *Williams v. State*, 95 Miss. 671, 49 So. 513 (1909); *James v. State*, 106 Miss. 353, 63 So. 669 (1913); *Dixon v. State*, 106 Miss. 697, 64 So. 468 (1914); *Simmons v. State*, 106 Miss. 732, 64 So. 721 (1914); *Akroid v. State*, 107

Miss. 51, 64 So. 936 (1914); *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914); *Pringle v. State*, 108 Miss. 802, 67 So. 455 (1915); *Davenport v. State*, 121 Miss. 548, 83 So. 738 (1920); *McLeod v. State*, 130 Miss. 83, 92 So. 828 (1922); *Hays v. State*, 130 Miss. 381, 94 So. 212 (1922); *Stevenson v. State*, 136 Miss. 22, 100 So. 525 (1924); *Allen v. State*, 139 Miss. 605, 104 So. 353 (1925); *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925); *Tatum v. State*, 142 Miss. 110, 107 So. 418 (1926).

It is not error to refuse an instruction the substance of which has already been given in another instruction. *Schrader v. State*, 84 Miss. 593, 36 So. 385 (1904).

The court cannot give instructions not asked in writing. *Johnson v. State*, 78 Miss. 627, 29 So. 515 (1901).

The court has no power to give instructions not asked. *Edwards v. State*, 47 Miss. 581 (1872).

#### 4. Oral instructions.

Although trial courts should always apprise counsel for all parties of communications with jury, supreme court's determination of whether failure to do so amounted to reversible error turns on whether ex parte communication prejudiced defendant so as to deny him fundamentally fair trial. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Trial court's response to jury question, without first informing defense counsel, which stated that jurors could look at each other's trial notes did not amount to abuse of discretion in murder prosecution; evidence was complex and consisted of testimony of many witnesses, and jurors were having trouble remembering testimony of some witnesses. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Oral jury instructions are not to be allowed regardless of who agrees to the procedure, and an oral instruction will be treated by the Supreme Court on appeal as a nullity. *Traylor v. State*, 582 So. 2d 1003 (Miss. 1991).

Confusion and misunderstanding is likely to be engendered when a trial judge attempts to instruct a jury orally through



a bailiff during deliberations. At the very least, a trial judge can reduce to writing all messages to be delivered to the jury and thereby prevent the bailiff from improperly conveying an oral message. *Edlin v. State*, 523 So. 2d 42 (Miss. 1988).

Statement by the trial court to the jury, after it had reported itself to be deadlocked, that it was possible for honest men and women to have a difference of opinion about the facts of the case but that they should seek to reconcile their differences, and that he was going to send them back to deliberate further was not in violation of this section [Code 1972, § 99-17-35]. *Dixon v. State*, 306 So. 2d 302 (Miss. 1975).

Where the prosecutor, in argument to the jury made a statement which was objected to and which the judge instructed jury to disregard, and the prosecutor subsequently, after conferring with the judge in jury's presence, informed jury that what he was going to say was permitted by the judge, and then repeated substantially the same originally objectionable statement, and the judge then denied objection to the latter statement, the effect was that of permitting counsel to give an oral instruction for the judge, and was a violation of this section [Code 1942, § 1530]. *Pearson v. State*, 254 Miss. 275, 179 So. 2d 792 (1965).

Although the action of the trial judge in calling the attention of the jury to any particular instruction is not to be condoned, it was not prejudicial error for him to read to the jury instructions previously granted the state and the defendant solely with respect to the form of the verdict. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

Remark of trial court, in ruling on right of prosecution to cross-examine accused in murder case concerning insurance on victim, that matter of insurance was wholly immaterial and that nothing about insurance was to be considered in any way derogatory to defendant, or derogatory to anybody else, is not equivalent to oral instruction to jury upon law of case contrary to express provisions of this section [Code 1942, § 1530], requiring all jury instructions upon the law to be in writing, and is not prejudicial to defendant. *Price*

*v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

Where in murder prosecution neither state nor defense requested manslaughter instruction, trial judge's statement, made in response to juror's statement that verdict might be reached if sentence lighter than life could be imposed, that supreme court had held that jury might render verdict of manslaughter held reversible error. *Westbrook v. State*, 174 Miss. 52, 163 So. 838 (1935).

It is reversible error for the court of its own motion to give the jury an oral instruction, although in response to questions asked by one of the jurors. *Gilbert v. State*, 78 Miss. 300, 29 So. 477 (1901).

### 5. Time for instructions.

There is no error in criminal prosecution in the granting of proper instructions, either during or after the close of the argument of case, unless instructions are granted secretly. *Goss v. State*, 205 Miss. 177, 38 So. 2d 700 (1949).

While the court may grant an instruction at any time before the jury retires, it should not do so after argument has commenced, except on rare and emergent occasions, and with opportunity to the other party to prepare and request counter charges. *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (1904).

The proper time for the granting of an instruction is after the close of the evidence and before the argument of the case. *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (1904).

The procuring of an instruction in a criminal case from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, is error, although on objection the state's attorney offered to permit defendant's counsel then to answer it. *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (1904).

### 6. Construction of instructions as a whole.

Jury instruction may be improper if it incorrectly states law, is without foundation in evidence, or is stated elsewhere in



instruction; however, jury instructions are to be read as whole and no one instruction is to be taken out of context of whole. *Williams v. State*, 667 So. 2d 15 (Miss. 1996).

Court's jury instructions will not warrant reversal if jury was fully and fairly instructed by other instructions. *Williams v. State*, 667 So. 2d 15 (Miss. 1996).

In an aggravated assault prosecution defended on M'Naghten insanity grounds, the giving of an instruction that voluntary intoxication was no defense could not have caused the jury to disregard defendant's insanity defense, where all of the instructions, when read together, clearly instructed the jury as to the state's burden in proving all elements of the crime and in proving defendant's sanity. *Norris v. State*, 490 So. 2d 839 (Miss. 1986).

The trial court did not commit reversible error in failing to grant the defendant a change of venue where the defendant offered no sworn evidence to support his motion and there was nothing in the record to show that the trial judge abused his discretion. *Butler v. State*, 320 So. 2d 786 (Miss. 1975), but see *Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).

In a murder prosecution, while the insanity instructions given were defective in that, although including the right and wrong test, they omitted reference to the defendant's ability to understand and appreciate the nature of his act, the defect did not constitute reversible error, where there were other instructions given which stated the correct rule. *Smith v. State*, 220 So. 2d 313 (Miss. 1969).

While, in a prosecution for manslaughter arising out of an automobile accident, the trial court might properly have granted an instruction announcing the rule of reasonable doubt and informing the jurors that each and every one must believe defendant guilty beyond a reasonable doubt before he should vote to convict, it was not error to refuse to so instruct where other instructions announced the same rules of applicable law and prescribed the duties of the jurors. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360 (1958).

Where an instruction granted to one accused of burglary and larceny, embodied

the same rules and legal principles and requirements for guilt as contained in an instruction requested by the accused, the court did not err in refusing the requested instruction. *Spiers v. State*, 229 Miss. 663, 91 So. 2d 844 (1957).

Instruction which, when standing alone, would be erroneous, is harmless when point of instruction is fully covered by other correct instructions granted both sides at trial. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

All instructions given in murder prosecution, both for state and for defendant, must be construed as one instruction and possibility of there being an unwarranted assumption by jury that defendant inflicted fatal blows by reason of instruction for state is eliminated when instructions granted defendant clearly require that jury believe beyond every reasonable doubt that defendant did inflict blows before they could find her guilty as charged. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Instructions in murder prosecution are all to be read together, unless in conflict, and if, when read together, instructions give jury law in case fully and fairly for state and defense, in accordance with requests, judgment on verdict of jury on conflicting testimony will not be reversed unless it affirmatively appear, from the whole record, that such judgment has resulted in miscarriage of justice. *Howze v. State*, 43 So. 2d 191 (Miss. 1949).

An erroneous instruction is not fatal if supplemented by an instruction supplying the missing element. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

The instructions must be taken as a whole, as one body, and announce, not the law for the plaintiff or the defendant, but the law of the case. *Holmes v. State*, 192 Miss. 54, 4 So. 2d 540 (1941).

An improper or erroneous definition of a crime though contradictory to a correct definition in another instruction would be reversible error. *McCoy v. State*, 91 Miss. 257, 44 So. 814 (1907); *Moore v. State*, 91 Miss. 250, 44 So. 817 (1907); *Sullivan v. State*, 92 Miss. 828, 46 So. 248 (1908); *Lewis v. State*, 93 Miss. 697, 47 So. 467 (1908); *Brett v. State*, 94 Miss. 669, 47 So.

781 (1909); *Williams v. State*, 95 Miss. 671, 49 So. 513 (1909); *Anglin v. State*, 96 Miss. 215, 50 So. 492 (1909), suggestion of error overruled, 96 Miss. 221, 50 So. 728 (1909); *Waldrop v. State*, 98 Miss. 567, 54 So. 66 (1910); *Long v. State*, 103 Miss. 698, 60 So. 730 (1913); *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914); *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924); *Woulard v. State*, 137 Miss. 808, 102 So. 781 (1925); *Pickett v. State*, 140 Miss. 671, 106 So. 95 (1925); *Frazier v. State*, 141 Miss. 18, 106 So. 443 (1925); *Stubblefield v. State*, 142 Miss. 787, 107 So. 663 (1926); *Norris v. State*, 143 Miss. 365, 108 So. 809 (1926).

Instruction for plaintiff and defendant should be construed together as an entirety. If an instruction is not in itself prejudicial to the opposite party although erroneous when considered by itself it will not be reversible error. *Murphy v. State*, 89 Miss. 827, 42 So. 877 (1907).

### 7. Applicability and responsiveness to evidence.

Only instructions applicable to the evidence in the case should be given. *Canterberry v. State*, 90 Miss. 279, 43 So. 678 (1907); *Williams v. State*, 90 Miss. 319, 43 So. 467 (1907); *Prince v. State*, 93 Miss. 263, 46 So. 537 (1908).

In a prosecution for grand larceny based on the taking of \$750 from a cash drawer in a bank, the trial court did not err in denying the defendant's request for a jury instruction regarding the lesser included offense of petit larceny, even though no witness could testify to actually seeing more than \$100 being taken. *Ford v. State*, 555 So. 2d 691 (Miss. 1989).

Aiding and abetting instruction, based on Model Jury Instruction, was inappropriate where it was not founded upon evidence elicited at trial; case was built entirely on circumstantial evidence, with two defendants being found together in car with stolen merchandise and close to burglary both in time and place; no evidence indicated either man was not an actual participant in burglary, and there was no evidence that either of defendants aided or abetted other; additionally, wording of instruction was awkward and misleading in that it appeared to state that if jury determined defendants in fact com-

mitted burglary, only one would be found guilty and another portion of instruction seemed to infer that neither defendant needed to be present at burglary to be found guilty. *Brazile v. State*, 514 So. 2d 325 (Miss. 1987).

In a grand larceny prosecution based upon the taking of an automobile from a used car lot, an instruction as to the necessity of an attempt to convert the property to the taker's own use was properly refused where there was nothing in the record on which to base the contention that the defendant took the automobile in the presence of other persons with the intent to return it or to buy it. *Lewis v. State*, 248 So. 2d 805 (Miss. 1971).

An instruction that if they believed that the accused and the county school superintendent were guilty of embezzling school funds, the jury might find the accused guilty regardless of whether he received any or all the money, was prejudicially erroneous, where there was no evidence upon which it could have been predicated. *O'Harrell v. State*, 97 So. 2d 517 (Miss. 1957).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused's testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

The court properly refused the accused's tendered instruction that if the property allegedly stolen was shown to have been taken openly and in the presence of third persons, it would be only evidence of trespass, where there was no evidence that the property was taken openly in the presence of other persons. *Crouse v. State*, 229 Miss. 15, 89 So. 2d 919 (1956).

A case in which the court properly instructed the jury that they "may" return one of three named verdicts. *Tatum v. State*, 142 Miss. 110, 107 So. 418 (1926).

It is error to give an instruction in the absence of evidence on the point. *Johnson v. State*, 124 Miss. 429, 86 So. 863 (1921).



An instruction which authorizes the jury to convict the defendant for lack of evidence is erroneous. *Benson v. State*, 102 Miss. 16, 58 So. 833 (1912).

A case where an instruction for defendant was properly refused on the charge of burglary and larceny. *Dees v. State*, 89 Miss. 754, 42 So. 605 (1907).

An instruction for the state is fatally erroneous if it ignores and removes from consideration of the jury a valid defense supported by evidence. *Suttle v. State*, 88 Miss. 177, 40 So. 552 (1906).

Where in a murder case the defense is not predicated on self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances, of which there was no evidence. *Sullivan v. State*, 85 Miss. 149, 37 So. 1006 (1905).

An instruction not based on evidence is fatally erroneous if by any means it might mislead the jury. *Cooper v. State*, 80 Miss. 175, 31 So. 579 (1902).

However the supreme court has announced the opposite doctrine in the following cases: *Virgil v. State*, 63 Miss. 317 (1885); *Parker v. State*, 102 Miss. 113, 58 So. 978 (1912), overruled on other grounds, *Houston v. State*, 105 Miss. 413, 62 So. 421 (1913) (ovrld by *Houston v. State* (1913) 105 Miss. 413, 62 So. 421); *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916).

## 8. —Murder or homicide cases.

A case in which the evidence showed defendant guilty of either murder or nothing and in which manslaughter instruction was given is held not erroneous. *White v. State*, 142 Miss. 484, 107 So. 755 (1926); *Fleming v. State*, 142 Miss. 872, 108 So. 143 (1926).

The following are cases holding that a manslaughter instruction on a trial of murder is harmless. *Rolls v. State*, 52 Miss. 391 (1876); *Lanier v. State*, 57 Miss. 102 (1879); *Powers v. State*, 83 Miss. 691, 36 So. 6 (1904); *Moore v. State*, 86 Miss. 160, 38 So. 504 (1905).

A murder defendant's statement that he had gone crazy and could not stop, that the victim would not stop "messaging" with him, without explaining how the victim was "messaging" with him, did not indicate that the defendant acted in lawful self-

defense or that the victim committed an outrageous act justifiably provoking the defendant into a rage, so as to entitle the defendant to a manslaughter instruction. *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

No error was committed in refusing defendants instructions in homicide prosecution that if the jury believed that the defendant, at the time he shot the victim, was suffering from mental disease, and that this condition of mind was sufficient to break down in defendant's mind, at the time of the shooting, the distinction between right and wrong, it was immaterial whether he was totally or only partially insane on other subjects, since there was no evidence to indicate that the defendant was partially insane on one subject and not insane on other subjects. *Herron v. State*, 287 So. 2d 759 (Miss. 1974), cert. denied, 417 U.S. 972, 94 S. Ct. 3179, 41 L. Ed. 2d 1144 (1974).

In a homicide prosecution, the granting of an instruction stating abstract principles of law relative to the guilt of a person consenting to and encouraging the commission of a crime, was error. *Kidd v. State*, 258 So. 2d 423, 53 A.L.R.3d 774 (Miss. 1972).

In a prosecution for the slaying of the manager of a service station, it was not error to present an instruction defining the collateral offenses of robbery and attempted robbery, where witnesses testified that the defendant made the statement that he was going to get some money, that he exhibited his pistol to them before the attempted robbery and killing, that money was found on the driveway of the service station after the shooting, and that the drawer of the cash register was open. *McNeal v. State*, 231 So. 2d 491 (Miss. 1970).

Where the evidence is sufficient to convict for murder, the defendant, if convicted of manslaughter, cannot complain of the granting of a manslaughter instruction. *Dover v. State*, 227 So. 2d 296 (Miss. 1969).

Where the victim of a homicide was a larger man than the defendant charged with the shooting, but at the time of the shooting the defendant was some distance from the victim and behind a counter,



while the victim was at the door of the building and there was no chance for the victim to use his superior strength upon the defendant from such position, a jury instruction referring to the difference in size of the defendant and the victim, applicable to the question whether the defendant had reasonable ground to believe he was in danger, was properly refused. *Corbin v. State*, 220 So. 2d 299 (Miss. 1969), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

One convicted of manslaughter may not complain of giving of a murder instruction. *Pickert v. State*, 234 Miss. 513, 106 So. 2d 681 (1958).

In a prosecution under an indictment charging accused, jointly with two others, with murder, accused's tendered instruction that since he was charged with the killing of the deceased with malice aforethought by the use of a certain gun, unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, where it was not supported by the evidence and was contrary to the provisions of Code 1942, § 1995. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

Where the evidence is sufficient to convict for murder, the defendant cannot complain of the granting of a manslaughter instruction, if he has been convicted of manslaughter. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273 (1956).

Refusal to grant defendant's requested instruction authorizing jury to find defendant guilty of simple assault and battery was proper where proof showed that defendant was either guilty of assault and battery with intent to kill and murder or nothing. *Duckworth v. State*, 209 Miss. 318, 46 So. 2d 787 (1950).

In prosecution for murder, conventional instruction as to verdicts and punishments upon conviction of murder, which does not contain instruction on manslaughter, is not improper on ground that it limits jury to murder or acquittal, when there is no evidence suggesting manslaughter. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

While a manslaughter instruction should not be given in a case of murder or complete justification, such instruction is

not reversible error. *Vassar v. State*, 200 Miss. 412, 27 So. 2d 541 (1946).

A case in which it is held harmless error to give a manslaughter instruction. *Stevenson v. State*, 136 Miss. 22, 100 So. 525 (1924).

An instance where it was harmless error to convict a defendant of manslaughter where the indictment charged murder and the evidence justified a verdict for murder. *Calicoat v. State*, 131 Miss. 169, 95 So. 318 (1923).

In a murder trial where there are elements of manslaughter a manslaughter instruction should be given. *Lee v. State*, 130 Miss. 852, 94 So. 889 (1923).

Where the parties had been engaged in a fight immediately prior to the killing it was not error to give a manslaughter instruction. *Springer v. State*, 129 Miss. 589, 92 So. 633 (1922).

A murder case in which it is not error to refuse a manslaughter instruction. *Leavell v. State*, 129 Miss. 579, 92 So. 630 (1922).

Where the defendant is either guilty of murder as charged or entirely innocent, a manslaughter instruction should not be given. *Walker v. State*, 123 Miss. 517, 86 So. 337 (1920).

If the evidence shows the killing was done in the heat of passion a manslaughter instruction could not be refused. *Martin v. State*, 112 Miss. 365, 73 So. 64 (1916).

A proper case in which the jury should be told plainly they must either find defendant guilty of murder or acquit him. (ovrld by *Houston v. State* (1913) 105 Miss. 413, 62 So. 421); *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916).

A murder charge in which a manslaughter instruction was authorized. *Pope v. State*, 105 Miss. 133, 62 So. 10 (1913).

A controverted fact in evidence should not be assumed. *De Silva v. State*, 91 Miss. 776, 45 So. 611 (1908).

### 9. Applicability to issues.

The giving of an instruction in a manslaughter prosecution to the effect that each person present at the time of and consenting to and encouraging the commission of a crime, and knowingly, wilfully, and feloniously doing an act which is an ingredient in the crime, or immediately

connected with it, or leading to its commission, is as much a principle as if he had with his own hand committed the whole offense, was erroneous since such instruction merely stated an abstract principle of law without relating to the particular issues in the case. *Kidd v. State*, 258 So. 2d 423, 53 A.L.R.3d 774 (Miss. 1972).

All instructions must be restricted to the issues developed by the evidence. *Allen v. State*, 139 Miss. 605, 104 So. 353 (1925).

It is error to refuse to grant an instruction on an issue raised. *De Silva v. State*, 91 Miss. 776, 45 So. 611 (1908).

Where, according to defendant's own story, the homicide was either a deliberate murder or was committed in self-defense, the action of the court in refusing an instruction as to manslaughter was correct. *Hannah v. State*, 87 Miss. 375, 39 So. 855 (1906).

#### 10. Assumption of facts.

In a criminal case, an instruction in which the facts set forth are not justified by the evidence, requiring the utilization of presumptions to supply the essential facts, should neither be requested nor given. *Kidd v. State*, 258 So. 2d 423, 53 A.L.R.3d 774 (Miss. 1972).

In a prosecution for assault with intent to kill, an instruction under which the nature of the weapon, and the felonious assault were facts to be determined by the jury from the evidence in the case beyond a reasonable doubt, did not assume that a handsaw was a deadly weapon. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110 (1958).

The clause of an instruction in a prosecution for burglary and larceny, submitting to the jury for its finding, the burglarious breaking into the house, the taking of certain articles, and their respective values, did not assume that the articles of personal property were of the value mentioned in the indictment, or take away the jury function of determining such values. *Spiers v. State*, 229 Miss. 663, 91 So. 2d 844 (1957).

State's instruction, in a prosecution for assault and battery with intent to kill, that if they believed beyond a reasonable doubt that accused wilfully, feloniously and with malice aforethought shot and wounded the victim with intent to kill, the

jury should find the accused guilty as charged even though they might believe that accused was drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

Instruction in criminal case must not assume as fact any fact that is in issue, or where there is no evidence to support it. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Instruction in murder prosecution is not erroneous as assuming defendant killed victim as it does not assume as fact that defendant inflicted fatal blow when it provides "if the defendant was inflicting blows," the qualifying word "if" eliminating any possibility of there being an unwarranted assumption by jury. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

An instruction must not be framed in such language as to introduce the danger that the jury may think therefrom that a disputed or essential fact has been, in the opinion of the court, established as true. *Marble v. State*, 195 Miss. 386, 15 So. 2d 693 (1943).

An instruction which assumes as true a material fact, the truth of which is for the determination of the jury, is erroneous. *Marble v. State*, 195 Miss. 386, 15 So. 2d 693 (1943).

Instruction in prosecution for grand larceny, assuming disputed facts that the property belongs to the prosecuting witness and that it was of the value of more than \$25, was erroneous. *Marble v. State*, 195 Miss. 386, 15 So. 2d 693 (1943).

An instruction on an assumption of facts is erroneous. *Cunningham v. State*, 87 Miss. 417, 39 So. 531 (1905); *Stringer v. State*, 38 So. 97 (Miss. 1905).

#### 11. Conflicting and inconsistent instructions.

In a burglary prosecution, an instruction to the effect that in order to show a burglary, it was not necessary to establish the actual breaking of a lock, door, or window, was complementary to rather than in conflict with a second instruction



that the jury might find the defendant guilty if it believed he broke the lock from the door and thereby gained entry. *Branning v. State*, 222 So. 2d 667 (Miss. 1969).

Accused cannot complain of the giving of a correct instruction for the state, although it is not consistent with the one given more favorably to the accused, where the one given in favor of the accused is erroneous. *Haney v. State*, 199 Miss. 568, 24 So. 2d 778 (1946).

While it is the duty of jury to obey instructions of the court, a verdict should not be set aside where it is clear that they were guided in their conclusions by a correct instruction, and without regard to an erroneous instruction which was inconsistent therewith. *Haney v. State*, 199 Miss. 568, 24 So. 2d 778 (1946).

In prosecution of father and son for assault and battery with intent to kill, instruction that if jury believed that father and son, or either of them, was guilty, the jury would be authorized to find both guilty, and instruction that if evidence showed guilt of one beyond reasonable doubt, and failed to show the guilt of the other, the jury should convict the former and acquit the latter, were irreconcilably conflicting. *Burnett v. State*, 192 Miss. 44, 4 So. 2d 541 (1941).

## 12. Invasion of province of jury.

A requested instruction that would permit the jury to find the defendant not guilty as acting in self-defense in killing the deceased, or guilty only of manslaughter if the jury believed that the defendant had requested the deceased to depart her premises but that the deceased had refused to do so, was properly refused where such instruction would have denied the jury the right to consider whether the defendant had fired the pistol with malice aforethought and whether there was premeditated design on her part to kill the deceased. *Seymore v. State*, 261 So. 2d 453 (Miss. 1972).

The opening clause of an instruction in a prosecution for burglary and larceny submitting to the jury for its finding, beyond a reasonable doubt, from the evidence, the burglarious breaking into the house, the taking of certain articles, and their respective values, did not assume

that the articles of personal property were of the value mentioned in the indictment, or take away the jury function of determining such values. *Spiers v. State*, 229 Miss. 663, 91 So. 2d 844 (1957).

In a trial on a charge of receiving stolen goods, an instruction that certain detailed facts, if shown, gave rise to a presumption that the defendant had knowledge of their being stolen property invaded the province of the jury and lured them from their duty to acquit the defendant unless they believed from the evidence that he was guilty beyond a reasonable doubt. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

Instruction authorizing convictions for manslaughter if the jury believe the evidence, held not to take from jury right to determine whether deadly weapon was used. *Starnes v. State*, 151 Miss. 156, 117 So. 520 (1928).

Instruction that the strongest proof of the good reputation of the prosecutrix was that no one heard her reputation discussed was erroneous. *Welch v. State*, 110 Miss. 147, 69 So. 770 (1915).

Instruction should not advise the jury that threats by accused against deceased might be construed with the other testimony in reaching the verdict. *Lucas v. State*, 109 Miss. 82, 67 So. 851 (1915).

Charge that accused was guilty if he started the trouble by an insult was erroneous, in taking from the jury the right to determine whether the insult excused the assault. *Wicker v. State*, 107 Miss. 690, 65 So. 885 (1914).

Under the statute the judge cannot invade the province of the jury by informing it what weight should or should not be given to establish facts. *Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890).

## 13. Comment on evidence.

Defendant's manslaughter conviction and 20-year prison sentence were upheld where the trial judge did not sum up or comment on defendant's testimony regarding instances of harassment and threats of violence and death made against defendant by the victim; the trial judge's comments were incident to the judge's ruling on the state's objections to the testimony. *Washington v. State*, 957 So. 2d 426 (Miss. Ct. App. 2007).



Trial judge's explanation of his ruling on defendant's objections to leading questions, stating that information regarding a telephone call was foundational and that he did not think it was offered for the truth of the matter asserted but the fact that the phone call was received, was not an impermissible comment on the evidence, or a communication of his views. *Irons v. State*, 886 So. 2d 726 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Trial court properly refused to give a jury instruction that improperly commented upon the evidence. *Salman v. State*, — So. 2d —, 2004 Miss. App. LEXIS 72 (Miss. Ct. App. Feb. 3, 2004), cert. denied, 882 So. 2d 234 (Miss. 2004).

In a prosecution for murder, the trial court's providing the jury with a definition of the M'Naghten rule did not impermissibly single out for particular attention any specific evidence or lack thereof. *Russell v. State*, 789 So. 2d 779 (Miss. 2001).

In a prosecution for armed robbery, the court erred when it simply answered "yes" to a question from the jury regarding whether they could convict the defendant of armed robbery without the policeman finding a gun because such constituted an improper comment on the testimony and weight of the evidence. *Mickell v. State*, 735 So. 2d 1031 (Miss. 1999).

A cautionary instruction concerning the testimony of a confidential informant was properly eschewed by the court as a comment on the weight of the evidence. *White v. State*, 722 So. 2d 1242 (Miss. 1998).

A trial court properly refused a defendant's requested jury instruction that law enforcement officers who appeared as witnesses were to be seen as no more believable than any other witness, since such an instruction would be an improper comment upon the evidence. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A statement by the trial judge to the jury during the defense counsel's closing

argument that "the attorneys will not intentionally try to mislead you" and "if you remember things differently from the attorneys, then your memory and recollection prevails," did not constitute a comment upon the weight of the evidence. *Dennis v. State*, 555 So. 2d 679 (Miss. 1989).

In ruling on the admissibility of photographs in a murder prosecution, statements made by the judge indicating that the "photographs should be admitted into evidence for the purpose of sustaining the State's position as to the cause of the injury or death" and that "they will aid or assist the jury in determining the facts" did not constitute an impermissible comment on the evidence. *Stokes v. State*, 548 So. 2d 118 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759 (1990), dismissal of habeas corpus aff'd, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Trial court did not err in refusing jury instruction that testimony of witness could be discredited or impeached by showing that on prior occasion or occasions he had made statement or statements inconsistent with or contradictory to testimony given at trial, because this would constitute improper comment on testimony. *Foster v. State*, 508 So. 2d 1111 (Miss. 1987).

Trial court did not err in refusing to instruct jury that it could consider criminal convictions of witnesses as touching on their credibility because such instruction would have been improper comment on testimony. *Foster v. State*, 508 So. 2d 1111 (Miss. 1987).

Trial court did not err in refusing to instruct jury that it could consider whether witness was offered lighter sentence or dismissal of charges of escape in exchange for testimony, in determining weight to place on his testimony, because this would have been improper comment on testimony. *Foster v. State*, 508 So. 2d 1111 (Miss. 1987).

In a prosecution for armed robbery, the trial court did not err in refusing to grant an instruction which stated that it was the jury's duty to consider not the quantity of witnesses testifying in the case, but

rather the quality of their testimony, since such instruction would have been a comment upon the weight of the evidence in violation of § 99-17-35. *Bell v. State*, 411 So. 2d 763 (Miss. 1982).

In a prosecution for murder the defendant was entitled to an instruction as to his right to carry and use a concealed weapon. *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

Statement by trial judge to defendant's witness, following his testimony, that "If I catch you telling an untruth here, you will be in front of me here," was a comment on the testimony of the witness and indicated to the jury the weight that they should give to the evidence, and was in violation of this statute. *Stallworth v. State*, 310 So. 2d 900 (Miss. 1975).

In liquor prosecution, instruction that "case like this is easy fabricated and difficult to defend," and if jury had reasonable doubt they should acquit, held properly refused. *Maxey v. State*, 158 Miss. 444, 130 So. 692 (1930).

#### 14. Weight of evidence.

In her embezzlement trial, defendant's proffered instruction stated, in part, that good character could in itself be sufficient to generate in the jurors' minds reasonable doubt as to the guilt of defendant such as to require an acquittal, although without it the other evidence would be convincing of guilt. The instruction would have been an improper comment upon the weight of the testimony and the trial court did not err in refusing it. *Montgomery v. State*, 891 So. 2d 179 (Miss. 2004).

While defendant is entitled to have instruction on theory of her defense, that instruction should not single out certain parts of evidence to the point that it amounts to comment on weight of evidence. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

In a prosecution for rape, the trial judge was not required to instruct the jury that they should scrutinize the prosecutrix' uncorroborated statement with extreme caution, since this section prohibits a judge from commenting upon the weight of the evidence and an instruction which cautions the jury not to give undue weight to the testimony of a particular witness con-

stitutes such a comment. *Goss v. State*, 413 So. 2d 1033 (Miss. 1982).

In a prosecution for assault on a police officer while acting within the scope of his duty and office, the trial court properly refused to instruct the jury that they were not to give the complaining witness' testimony any added weight merely because he was a law enforcement officer; the requested instruction constituted an impermissible comment upon the weight of evidence. *Stewart v. State*, 355 So. 2d 94 (Miss. 1978).

In a prosecution for manslaughter, the trial court did not err in refusing defendant's requested instruction which was no more than a comment on the weight and worth of the evidence. *Evans v. State*, 315 So. 2d 1 (Miss. 1975).

In prosecution for manslaughter, instructions which either pointed out, directed attention to, or emphasized certain aspects of the testimony given by particular witnesses, in such a manner as to constitute a comment or charge upon a weight of the evidence, or the announced principles of law covered by the given instructions or propositions inapplicable to the issues involved, were properly refused. *Hardeman v. State*, 216 Miss. 115, 61 So. 2d 797 (1953).

In prosecution for assault and battery with intent to kill and murder, instruction directing jury to take into consideration fact that defendant had another load in his gun and could have used it and killed his alleged victim, if he had so desired, but did not do so because he did not want to kill him, was properly refused as it amounts to a comment on weight of evidence as to whether or not defendant shot with intent to kill and murder. *Cearly v. State*, 204 Miss. 299, 37 So. 2d 316 (1948).

Court's statement to jury, in prosecution for robbery with deadly weapon, to exclude testimony concerning guns which nobody had identified positively and to consider only testimony concerning dollar bills that had been identified positively as the property of the victim, was held not to be prejudicial error as constituting a commentary upon the weight of the evidence. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Refusal of court to instruct the jury that if they believe from the evidence that any



witness had theretofore, or on the trial, sworn falsely to any material fact or facts in the case, they might disregard the testimony of each such witness altogether was proper, since such instruction was clearly erroneous as being upon the weight of the evidence and the credibility of witnesses and fell under the condemnation visited upon the so-called principle of "falsus in uno." *Dolan v. State*, 195 Miss. 154, 13 So. 2d 925 (1943).

Instruction that the jury might disregard the entire testimony of one who had wilfully testified falsely on a material matter in the case, though the testimony of any such witness should be corroborated, was properly refused as being argumentative and upon the weight of the evidence and credibility of witnesses. *Dolan v. State*, 195 Miss. 154, 13 So. 2d 925 (1943).

Court's statement, in denying directed verdict, that question whether deceased died from wounds inflicted by defendant was for jury, held not comment on testimony and instruction on weight thereof. *Bumpus v. State*, 166 Miss. 276, 144 So. 897 (1932).

An instruction with reference to weight of evidence held not erroneous. *Huddleston v. State*, 134 Miss. 382, 98 So. 839 (1924).

An instruction held to be upon the weight of evidence and erroneously given. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

In prosecution for embezzlement, instruction that the mere failure on the part of defendant, without explanation to turn over to his employer the funds in his hands belonging to it, established guilt, was erroneous. *Hampton v. State*, 99 Miss. 176, 54 So. 722 (1911).

Instruction that, in passing on the evidence of a non-expert, jury should be governed by the circumstances related by the witness on which he based his opinion, was erroneous, as directing the jury not to give any weight to the opinion of the witness based on the facts detailed. *Bacot v. State*, 96 Miss. 125, 50 So. 500 (1909).

It is error to instruct the jury not to give any weight to the opinion of a nonexpert witness on facts detailed by him. *Bacot v. State*, 96 Miss. 125, 50 So. 500 (1909).

Instruction upon the weight of the evidence or which unduly emphasizes parts of the evidence is erroneous. *Gordon v. State*, 95 Miss. 543, 49 So. 609 (1909).

Instruction that if the jury believe from the evidence, beyond a reasonable doubt, that defendant wilfully and maliciously shot and killed deceased with a deadly weapon at a time defendant was in no imminent danger and when he had no reasonable ground to apprehend such danger, he was guilty of murder, held not on weight of testimony. *Brett v. State*, 94 Miss. 669, 47 So. 781 (1909).

Error to refuse a charge that if the jury believe from the evidence that the confessions, if any, were brought about by fear, duress, intimidation, or by hope or promise of reward, or that such confessions, if any, were untrue, then they may disregard them altogether. *Johnson v. State*, 89 Miss. 773, 42 So. 606 (1907).

In a criminal prosecution, an instruction that, "if, from the evidence in this case, you believe any witness testified falsely to a material fact, it is your duty and you should disregard the testimony of such witness," is error. *Davis v. State*, 89 Miss. 119, 42 So. 541 (1907).

Instructions in criminal cases should be refused if they are upon the weight of the evidence or if there is no evidence on which to predicate them. *Tidwell v. State*, 84 Miss. 475, 36 So. 393 (1904).

Under this section [Code 1942, § 1530] an instruction for the state in a murder case is erroneous which tells the jury to consider certain evidence only in determining whether the defendant was sane or insane, and if they find him to have been sane, not to consider it as a matter of justification, palliation or excuse for the crime. *Maston v. State*, 83 Miss. 647, 36 So. 70 (1904).

An instruction that "a confession freely and voluntarily made is among the best evidence known to the law, and that if they believe from the evidence that the defendant made such a confession they are authorized to consider it with the other evidence," etc., is upon the weight of evidence. *Thompson v. State*, 73 Miss. 584, 19 So. 204 (1896).

An instruction that certain facts alone are not enough to warrant conviction is on



the weight of evidence. *Burt v. State*, 72 Miss. 408, 16 So. 342, 48 Am. St. R. 563 (1894).

### 15. Undue prominence to particular matters.

The trial court properly refused to give an instruction requested by defendant, that no class of testimony is more uncertain than that of identity and that extreme care should be used in scrutinizing such testimony, since such instruction was a comment on the evidence and gave undue weight to a particular class of evidence. *Hines v. State*, 339 So. 2d 56 (Miss. 1976).

Where homicide resulted from shot fired while parties were tussling and quarrelling, instruction that jury might disregard testimony of chief witness if it believed he was at time of homicide unable, from intoxication, to understand and realize what was happening was argumentative and singled out for emphasis parts of the testimony and was therefore properly refused. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

Instruction which points out and unduly emphasizes any particular bit of testimony in such manner as to amount to comment on weight thereof is improper. *Cearly v. State*, 204 Miss. 299, 37 So. 2d 316 (1948).

Even though evidence is competent, relevant and important on the issue of guilt or innocence, it is improper for the court to single it out as giving rise, in a prosecution for receiving stolen goods, to a presumption that the defendant had knowledge of their being stolen property. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

Instruction which unduly emphasizes parts of the evidence is erroneous. *Gordon v. State*, 95 Miss. 543, 49 So. 609 (1909).

Instructions giving undue prominence to particular parts of the evidence are properly refused. *Illinois Cent. R.R. v. Clark*, 85 Miss. 691, 38 So. 97 (1905).

### 16. Instructions as to more than one theory.

Case against defendant was not based entirely on circumstantial evidence, and thus, "2-theory" instruction was not required in defendant's prosecution for co-

caine possession, where motel room in which cocaine was found was registered in name of defendant alone and only one key had been issued to its occupant, and defendant's own testimony placed cocaine inside motel room. *Petti v. State*, 666 So. 2d 754 (Miss. 1995).

Only where evidence is purely circumstantial, trial court must grant "2-theory" instruction which instructs that if facts are susceptible of 2 interpretations and there is reasonable doubt as to correct interpretation, then jury must resolve such doubt in favor of accused. *Petti v. State*, 666 So. 2d 754 (Miss. 1995).

A capital murder defendant was entitled to a "2 theory" instruction where the case was based entirely on circumstantial evidence and there were several facts or circumstances which were susceptible of 2 interpretations, one favorable to the defendant and the other one unfavorable, and therefore the trial court's failure to give the requested 2 theory instructions warranted reversal of the defendant's conviction. *Parker v. State*, 606 So. 2d 1132 (Miss. 1992).

In prosecution for involuntary manslaughter with motor vehicle, refusal of defendant's request for the two-theory instruction is not reversible error, where case does not rest entirely upon circumstantial evidence, and defendant obtained number of instructions admonishing jury that defendant was presumed to be innocent, that burden was upon state to establish his guilt and all the essential elements thereof beyond reasonable doubt. *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950).

Refusal of defendant's requested instruction in prosecution for larceny that where two reasonable theories arise from the evidence, one favorable to the state and one favorable to defendant as to guilt or innocence of defendant, it is jury's duty to adopt theory most favorable to the defendant and find him not guilty, was proper. *Simmons v. State*, 208 Miss. 523, 44 So. 2d 857 (1950).

Refusing to grant defendant's requested instructions in grand larceny prosecution that if the property alleged to have been stolen is shown to have been taken openly and in the presence of the owner or third

persons then this carries with it only evidence of trespass was not error in view of the court's other instructions which cured the defect. *Oakman v. State*, 206 Miss. 136, 39 So. 2d 777 (1949).

This is especially true where the court, in other instructions, has covered the law of the case. *Cain v. State*, 135 Miss. 892, 100 So. 578 (1924).

An instruction may be refused directing an acquittal if there are two reasonable theories in the mind of the jury, one that defendant is guilty, and one that defendant is innocent. *Roux v. Gulfport*, 97 Miss. 559, 52 So. 485 (1910); *Saucier v. State*, 102 Miss. 647, 59 So. 858 (1912); *Saucier v. State*, 102 Miss. 647, 59 So. 858 (1912).

Instruction that if the evidence presents two reasonable theories, one favorable to the state, and the other to defendant, it is the jury's duty to accept the latter theory and acquit defendant, though the other theory is the more reasonable and supported by the stronger evidence, is properly refused. *Runnels v. State*, 96 Miss. 92, 50 So. 499 (1909).

Although the state's theory is presented in the state's charges, the court may modify an instruction asked by the accused so as to incorporate the theory upon which a conviction is asked. *Smith v. State*, 75 Miss. 542, 23 So. 260 (1898).

### 17. Peremptory instruction.

Because (1) two victims identified defendant as one of the robbers, (2) defendant's former girlfriend testified that defendant had told her of the plans to rob someone and later shown her some of the stolen items, (3) the police recovered some of the stolen items from the woods behind the girlfriend's house, and (4) defendant confessed to the crime, the evidence was sufficient to uphold defendant's conviction for armed robbery; thus, the trial court did not err in denying defendant's motion for a directed verdict, motion for judgment notwithstanding the verdict, and defendant's request for peremptory instructions. *Lott v. State*, 844 So. 2d 502 (Miss. Ct. App. 2003).

Jury instruction on offense of murder was not peremptory, as it allowed jury to consider homicide less than murder; instruction allowed jury to decide whether

shooting was in self-defense. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

If defendant and his witnesses are the only eyewitnesses to homicide and if their version of what happened is both reasonable and consistent with innocence, and if there is no contradiction of that version in physical fact, facts of common knowledge or other credible evidence, then no reasonable juror could find defendant guilty beyond reasonable doubt and, under such circumstances, peremptory instructions must be granted. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A defendant who was convicted of involuntary manslaughter was entitled to a peremptory instruction based on the Weathersby Rule, and the trial court erred in failing to direct a verdict for him where the defendant was the only eyewitness, there was no substantial contradiction in the defendant's statements before and during the trial, and the State presented no evidence which substantially contradicted the defendant's version of the altercation between the victim and the defendant, which indicated that the victim was the aggressor and that the victim died because of a heart attack which was not caused by any action of the defendant. *Pritchett v. State*, 560 So. 2d 1017 (Miss. 1990).

In a murder prosecution where the defense was insanity, and where the state introduced testimony to prove that the defendant was sane, and the defendant introduced both lay and expert medical testimony that he was insane, the defendant's motions for a directed verdict at the conclusion of the state's evidence, and again at the conclusion of all the testi-



mony, were properly overruled, the evidence being sufficient to make a question for the jury whether the state had proved beyond a reasonable doubt that the defendant could distinguish right from wrong at the time of the homicide. *Smith v. State*, 220 So. 2d 313 (Miss. 1969).

In a kidnapping prosecution, a defendant who contended that he took no part in the commission of the crime and was guilty of nothing more than a failure to prevent another from kidnapping, beating and robbing the victim, but who admitted that he was present at all times, and who, at the time of his arrest, was in possession of articles taken from the victim, was not entitled to a peremptory instruction, the question of his guilt being for the jury. *Hall v. State*, 220 So. 2d 279 (Miss. 1969).

The trial court committed no reversible error in refusing to grant a peremptory instruction to find the defendant not guilty of murder where he was not convicted of murder but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. *Kinkead v. State*, 190 So. 2d 838 (Miss. 1966).

The uncontradicted testimony of the accused that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man coming toward him, and upon inquiring who it was, the man cursed him and continued to advance, so that accused, apprehending that the man was about to do him some great bodily harm or kill him, then fired in defense of his own life, was, under the circumstances, reasonable, and, therefore, must be accepted as true, and the accused was entitled to a peremptory instruction. *Lee v. State*, 232 Miss. 717, 100 So. 2d 358 (1958).

The testimony of accused, charged with murder of his wife, which contained many contradictions as to material matters, as well as the physical facts, and the contradiction of the accused by other credible witnesses in particular matters, established that the accused was not entitled to a peremptory instruction under the rule that where the defendant or his witnesses are the only eyewitnesses to the homicide

their version must be accepted unless substantially contradicted in material particulars by credible witnesses, physical facts, or facts of common knowledge. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595 (1958).

Evidence, including positive identification of the accused by residents of the dwelling, was sufficient to sustain a conviction of burglariously breaking and entering a house with intent to commit rape, so that the accused was not entitled to a peremptory instruction. *McDole v. State*, 229 Miss. 646, 91 So. 2d 738 (1957).

Where an indictment charged that the accused unlawfully sold intoxicating liquors, but the state proved that the accused gave the prosecuting witness a gallon of liquor and \$1.50 in cash in exchange for a car battery, there was a fatal variance between the indictment and the proof, and the accused is entitled to a peremptory instruction. *Elkins v. State*, 229 Miss. 323, 90 So. 2d 662 (1956).

Accused was entitled to a peremptory instruction in an armed robbery prosecution where his alibi thoroughly impeached the state's evidence consisting solely of the uncorroborated testimony of an alleged accomplice, a habitual criminal who had not been sentenced although he had plead guilty of the robbery. *Pegram v. State*, 228 Miss. 860, 89 So. 2d 846 (1956).

Error of court in overruling defendant's motion to exclude state's evidence and for instruction requiring jury to return verdict of not guilty made at conclusion of state's evidence in trial of charge of unlawful possession of intoxicating liquor is waived by defendant who proceeds to introduce evidence in his own behalf. *Faust v. State*, 43 So. 2d 379 (Miss. 1949).

Lower court is not in error in failing to direct verdict for defendant in prosecution for unlawful possession of intoxicating liquor at conclusion of all evidence when trial court is not given opportunity to pass upon question of whether defendant was entitled to directed verdict because no motion for direction of verdict was made. *Faust v. State*, 43 So. 2d 379 (Miss. 1949).

When defendant is the only eyewitness to homicide, her version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars



by creditable witnesses for state, or by physical facts or by facts of common knowledge, and when such evidence shows that the defendant acted upon what then reasonably appeared to be necessary for protection of her life, verdict should be directed in favor of defendant. *Lomax v. State*, 205 Miss. 635, 39 So. 2d 267 (1949).

In murder prosecution refusal of court to grant peremptory instruction to find defendant not guilty is not error where defendant and his witnesses are only eye-witnesses to homicide and their version is not contradicted by state, but physical facts contradict defendant in his testimony that he was in danger of death or great bodily harm at hands of deceased and that it was necessary for him to strike in self defense. *Robinson v. State*, 205 Miss. 281, 38 So. 2d 723 (1949).

Trial court cannot be put in error for its failure to direct jury to acquit defendant at conclusion of all evidence when defendant does not elect to stand on record as made when prosecution rested its case, but introduces proof in his own behalf and fails at conclusion of all the evidence to renew his motion for directed verdict. *Smith v. State*, 205 Miss. 170, 38 So. 2d 698 (1949).

On conflicting evidence a peremptory instruction should not be given. *Huddleston v. State*, 134 Miss. 382, 98 So. 839 (1924); *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

### 18. Modification of withdrawal.

Granting of erroneous instruction to state does not constitute reversible error when it is withdrawn after it is read to jury and trial judge refuses to permit jury to consider it. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

A judge is not required to make a modification although the instruction is approximately correct. *Hughey v. State*, 106 So. 361 (Miss. 1925).

An instruction may be modified, although that does not change the meaning, without error. *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914).

By accepting and reading to the jury a modified instruction the defendant waives his right to object to the error modifying it. *Williams v. State*, 95 Miss. 671, 49 So. 513 (1909).

A case where the court erred in a modified instruction. *Spell v. State*, 89 Miss. 663, 42 So. 238 (1906).

The court may modify a requested instruction, but it is under no obligation to do so. *Johnson v. State*, 78 Miss. 627, 29 So. 515 (1901).

### 19. Cure of error.

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his defense on the facts of the case, any error in court's instruction given to state that jury in determining what weight should be given to the testimony of any witnesses had the right to consider what interest the witness may have had in the results of the trial, was cured by an instruction for the defense directing the jury to consider defendant's testimony as that of any other witness, and not to arbitrarily ignore him, simply because he was a defendant in the case. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533 (1959).

Refusal to grant defendant's requested instructions, in prosecution for grand larceny, was not error, where the instruction given embodied defendant's theory of defense that he was too intoxicated to form requisite intent. *Edwards v. State*, 207 Miss. 328, 42 So. 2d 230 (1949).

Error, if any, in instruction on circumstantial evidence was cured by a similar instruction granted to and used by the defendant. *Holmes v. State*, 192 Miss. 54, 4 So. 2d 540 (1941).

An erroneous instruction in a murder case which fails to define the elements of the crime may be cured by instructions given for the defendant. *Upton v. State*, 143 Miss. 1, 108 So. 287 (1926).

An instruction on the essentials constituting an offense which is erroneous is not cured by other instructions in the same case. *Lott v. State*, 130 Miss. 119, 93 So. 481 (1922).

### 20. Subject matter of instructions.

#### 21. —Definition and description of crime; murder or homicide cases.

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder,

"culpable negligence" should be defined as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." *Clayton v. State*, 652 So. 2d 720 (Miss. 1995).

In a capital murder prosecution, an instruction on "malice aforethought" was improper where it stated that if the defendant "at the very moment of the fatal shot did so with the deliberate design to take the life of the deceased . . . then it was malice aforethought as if deliberate design had existed in the mind of the defendant for minutes, hours, days or weeks or even years"; however, the instruction was irrelevant and harmless, since there was abundant evidence of premeditation and no evidence that the slaying was a sudden idea of the defendant's. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error by giving an instruction stating that "deliberate design" could be formed "at the very moment of the act of violence." *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

A trial court's instruction to the jury that the defendant should be found guilty of capital murder if the jury found that he killed the victim while committing the crimes of kidnapping "or" robbery did not require reversal of the defendant's conviction, in spite of the defendant's contention that the instruction permitted the jury to return a less-than-unanimous verdict because some jurors could have found him guilty of kidnapping but not robbery while other jurors could have found him guilty of robbery but not kidnapping, where the jury's sentencing verdict clearly indicated a finding that the defendant was engaged in both kidnapping and robbery when he murdered the victim, and all 3 crimes of which the defendant was accused occurred as part of a single transaction and were essentially inseparable. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In a capital murder prosecution arising from the defendant's alleged killing of the victim while engaged in the commission of

a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as "felonious intent," where the language "without authority of the law" was used in the instruction defining capital murder, so that robbery was defined correctly tracking the language of the statute when the 2 instructions were read together. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

It was not error for a trial court to refuse to give a defendant's requested instruction regarding manslaughter by culpable negligence, which offered the civil definition of negligence to permit the jury to compare civil negligence with the culpable negligence required for conviction under § 97-3-47, since such an instruction is not required for comparison purposes. However, this does not mean that trial courts should never give an instruction for such purposes; it is a practice that should be encouraged, especially since juries are inclined to convict under § 97-3-47 when the evidence rises to no more than simple negligence. *Robinson v. State*, 571 So. 2d 275 (Miss. 1990).

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental state. The cumulative effect of the instruction was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

A jury instruction stating that malice aforethought and a premeditated design to kill must exist in the mind of the defendant but for an instant before the



fatal act did not constitute reversible error; the defendant would not have been harmed or prejudiced even if the instruction had stated that malice need only exist at the very moment of the fatal act, where the State's theory of the case was that the defendant lured the victim to his home with the deliberate design to murder him, and the defense theory was that the defendant's shooting of the victim was justifiable homicide in response to his finding that the victim had broken into his home and was standing in his hallway holding a hammer, since under the State's theory the malice would have existed long before the fatal shooting and under the defense theory it never existed. *Thornhill v. State*, 561 So. 2d 1025 (Miss. 1989), reh'g denied, 563 So. 2d 609 (Miss. 1990).

In a murder prosecution, a trial court committed reversible error in granting a supplemental instruction after the jury had retired, defining "malice aforethought" from Black's Law Dictionary, which stated that "malice aforethought exists where the person doing the act which causes the death has an intention to cause death or grievous bodily harm to any person" and additionally defined malice aforethought as existing when the defendant has an intention "to commit any felony whatever, has the knowledge that the act will probably cause the death or grievous bodily harm to some person, although he does not desire it or even wishes that it may not be caused ..." *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

In a prosecution for assault and battery with intent to kill and murder, an instruction was erroneous which did not embody within it the intent to kill or murder on the part of the defendant, which error was not rectified by other instructions given. *Jackson v. State*, 246 So. 2d 553 (Miss. 1971).

An instruction that if "the defendant, ... acted with the deliberate design to take the life" of the deceased connoted intent to kill, and failure to use the word "intent" in the instruction did not render it improper. *Peterson v. State*, 242 So. 2d 420 (Miss. 1970).

Part of an instruction which stated in effect that the alleged murderer must

have determined to commit the murder and then "settled down with this firm determination" was properly deleted because it indicated a waiting period after determining to commit murder, whereas no definite time is required to form a design to kill, the slayer being guilty of murder so long as malicious intent is present at the time of the killing. *Peterson v. State*, 242 So. 2d 420 (Miss. 1970).

In a prosecution for assault with intent to kill and murder, an instruction to the effect that the jury should convict the defendants if it should find that the defendants committed assault and battery upon the victim "by use of means or force likely to produce death, with the intent to maim or kill and murder" him, was prejudicial error, where the evidence as to intent was inconclusive, as was evidence of facial injuries sustained by the victim of the assault. *Johnson v. State*, 230 So. 2d 810 (Miss. 1970).

In a prosecution for involuntary manslaughter by culpable negligence, a charge to the jury defining culpable negligence as such negligence as evinces a flagrant and reckless disregard for the safety of others or wilful indifference to the injury liable to follow, was erroneous as defining gross negligence rather than culpable negligence. The term culpable negligence in the statute defining manslaughter by culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life. *Grinnell v. State*, 230 So. 2d 555 (Miss. 1970).

In a case where it was alleged that the defendant "stomped" the decedent to death it was not prejudicial error to grant the state's instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of Code 1942, § 2226, although more properly the instruction should have been framed under Code 1942, § 2225. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, state's instruc-



tion if the jury believed from all the evidence beyond a reasonable doubt that one of the others murdered the deceased, and that accused without being forced or coerced transported the others in his automobile to where they obtained rifles knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

In a murder prosecution, where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. *Barnett v. State*, 232 Miss. 208, 98 So. 2d 656 (1957).

In a murder prosecution, the trial court did not err in giving state's instruction that, if the jury believed from all the evidence in the case beyond a reasonable doubt that the defendant had deliberately shot and killed the deceased with a deadly weapon, malice might be inferred. *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236 (1957).

Granting to state of two instructions defining manslaughter and authorizing verdict in that degree is not reversible error in murder prosecution in which there is present no element of manslaughter and jury finds defendant guilty of murder. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949); *Porter v. State*, 39 So. 2d 307 (Miss. 1949).

In murder prosecution, instruction for state defining malice aforethought is not erroneous on ground that it omits reference to accidental killing when there is little, if anything, in the record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

In murder prosecution, instruction for state that malice will be implied from

deliberate use of deadly weapon is not proper where all of the facts are in evidence, but court is entitled to consider the law on the question in determining whether issue of murder should be submitted to jury at all. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949).

A definition of murder in the exact language of the statute is not error on the ground that it states an abstract legal definition. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Trial court in murder prosecution did not err in failing to give instructions defining manslaughter in connection with the instruction defining murder in the absence of evidence authorizing a verdict of manslaughter. *Farr v. State*, 199 Miss. 637, 25 So. 2d 186 (1946).

Error in instruction pertaining to malice in prosecution for assault with intent to murder, was not reversible where evidence was overwhelming that the assault was wholly unjustified, although where guilt is less patent such error would require reversal. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

An instruction which erroneously defined manslaughter held reversible error. *Cox v. State*, 141 Miss. 607, 107 So. 7 (1926).

A case in which the refusal of an instruction to acquit defendant of murder under strong circumstances of manslaughter held not error, although instruction was faulty in failing to embrace the theory of sudden passion. *Hughey v. State*, 106 So. 361 (Miss. 1925).

Leaving out of an instruction "in the heat of passion" held to be not harmful. *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

It is not reversible error for an instruction to define murder and manslaughter where there are other instructions covering contingencies on which the accused was justified. *McGehee v. State*, 138 Miss. 822, 104 So. 150 (1925).

The defendant must have had intent to kill with malice aforethought when he called upon his wife to shoot deceased and an instruction which does not so state is erroneous. *Smith v. State*, 91 So. 41 (Miss. 1922).

An instruction authorizing the finding of different verdicts in a murder case, which does not attempt to define the crime of murder, held not erroneous. *Dixon v. State*, 106 Miss. 697, 64 So. 468 (1914).

In a charge for assault with intent to kill and murder the instruction of the court should give the elements of the crime charged. *Bell v. State*, 90 Miss. 104, 43 So. 84 (1907).

An instruction purporting to define murder under the statute which excludes the statutory words "without authority of law" is erroneous. *Ivy v. State*, 84 Miss. 264, 36 So. 265 (1904); *Rutherford v. State*, 100 Miss. 832, 57 So. 224 (1911).

If it is unquestionable that a murder was committed and the only inquiry is as to the identity of the criminal, reversible error cannot be predicated of an instruction, because it refers to the crime as murder. *Dean v. State*, 85 Miss. 40, 37 So. 501 (1904).

## 22. — —Other cases.

Instruction on attempted sexual battery that required jury to find, as overt act, defendant's attempt to place his penis into victim's anus, in combination with instruction that charged jury that "in order to prove an attempt to commit sexual penetration, the State must prove that the intended act was prevented from taking place by resistance or other means," fully and correctly charged jury on elements of the crime. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220 (Miss. 1995).

In a prosecution for aggravated assault, the injuries inflicted upon the victim clearly constituted "serious bodily injury" within the meaning of § 97-3-7(2) where a blow to the head knocked the victim unconscious and opened a flesh wound requiring sutures, the victim's jaw was broken in 2 places, an injury to the victim's arm required surgery under general anesthesia, a bone graft, and the insertion of a metal plate, and the victim was unable to use his arm or return to work for at least

4 weeks; thus, the trial court did not err in refusing the defendant's requested instruction defining serious bodily injury as "injuries involving great risk of death." *Fleming v. State*, 604 So. 2d 280 (Miss. 1992).

A jury instruction on accessory before the fact was inadequate where it did not instruct the jury to find beyond a reasonable doubt that the crime was actually committed, but only instructed the jury to determine whether the defendant was an accessory before the fact, leaving them to assume that the occurrence of the crime was an established fact. *Wilson v. State*, 592 So. 2d 993 (Miss. 1991).

In a prosecution for grand larceny for theft of an automobile, the trial court did not err in failing to instruct the jury that a necessary element of the crime of grand larceny was that the defendant must have intended to permanently deprive the owner of his automobile, where the court instructed the jury that it should find the defendant guilty of grand larceny if he "did feloniously take, steal, and carry away the property," since the word "feloniously" means done with criminal intent. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

In a prosecution for accessory before the fact of sale of cocaine, an instruction was sufficient to advise the jury that, before it could find the defendant guilty as an accessory before the fact, it also had to find the fact, where the instruction stated that the jury was required to find that the defendant arranged for the sale of cocaine "and that this occurred in Lauderdale County, Mississippi"; although the quoted language intended to address the point of venue, it sufficiently informed the jury that, before convicting, it was required to find that the sale had occurred in fact. *Turner v. State*, 573 So. 2d 1340 (Miss. 1990), post-conviction relief denied, 673 So. 2d 382 (Miss. 1996).

In a prosecution for conspiracy to commit grand larceny involving the stealing of a portable generator, a requested instruction, which stated that before the defendant could be found guilty of conspiracy, the evidence had to show that the defendants "did willfully, unlawfully and feloniously conspire, confederate and agree to



gether and with each other to unlawfully commit grand larceny by stealing a generator ..." was properly denied since it misstated the law in that it stated that the defendant must have agreed to steal the generator by a more formal agreement than is required. *Rose v. State*, 556 So. 2d 728 (Miss. 1990).

There was no potential prejudice to the defendant by virtue of the fact that a jury instruction requested by the state was given combining "form of the verdict" language with an instruction as to the elements of the charged offense. *Doby v. State*, 532 So. 2d 584 (Miss. 1988).

Section 97-3-95 creates separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." *Ryan v. State*, 525 So. 2d 799 (Miss. 1988).

Instructions in a criminal case which follow the language of a pertinent statute are sufficient. *Crenshaw v. State*, 520 So. 2d 131 (Miss. 1988).

An instruction for the prosecution, granted in a trial of an indictment under Code 1942, § 2179, which stated the elements of the offense in the alternative that the defendant either knew, or had reasonable reason to believe, that he was uttering a forged instrument would ordinarily be fatally defective, for the language of the section requires that the person uttering the instrument must know it to be forged; but such defect may be cured by properly phrased instructions granted on behalf of the defendant. *Pierce v. State*, 213 So. 2d 769 (Miss. 1968).

In a grand larceny prosecution, wherein the defendant was accused of stealing 530 gallons of insecticide of the value of \$1,645.00, the trial court did not err in giving the state an instruction as to larceny only of a 55-gallon drum of insecticide of the value of \$415.50. *Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957).

Where the defendant and the county superintendent of education were charged in the indictment with embezzlement of county school funds, a warrant for \$1,629.00, an instruction which by its language relieved the prosecution of the burden of proving any particular act of em-

bezzlement was erroneous. *O'Harrell v. State*, 97 So. 2d 517 (Miss. 1957).

In a prosecution for practicing medicine without a license, court's instruction that if the jury believed that a chiropractor, for compensation, injected vitamins or penicillin into the body of his patients by use of a hypodermic needle for the relief, cure, or palliation of ailment or disease of the body, they were authorized to find him guilty, was not erroneous. *Harris v. State*, 229 Miss. 755, 92 So. 2d 217 (1957).

State's instruction, which followed the wording of the statute and the indictment, correctly informed the jury of the elements of the crime of second degree arson notwithstanding the fact that it failed to expressly and specifically require the jury to find the accused had the intent to burn the buildings. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

Instruction in prosecution for contributing to delinquency of minor under age of 18 years which does not follow exact language of indictment but follows statute and defines offense is sufficient. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

In prosecution under Code 1942, § 2232, for involuntary manslaughter with motor vehicle, there is no error in granting to state instruction defining culpable negligence. *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950).

In prosecution for assault and battery with intent to kill under Code 1942, § 2011, instruction defining crime with which defendant is charged is sufficient if it sets forth all of the elements of crime and state need not request instruction defining essential elements of crime of murder, though defendant may request such instruction if he desires. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

Instruction requiring only that jury find that an assault was made "with some instrument capable of producing death or great bodily harm" is erroneous, since statute (Code 1942, § 2011), pertaining to assault with intent to kill, requires that the assault be made with "any deadly weapons or other means or force likely to produce death." *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949).

Instruction for state that if jury believes from evidence beyond every reasonable



doubt that defendant is guilty as charged in indictment is prejudicially erroneous as it does not inform jury of elements of crime of forgery for which defendant was being tried. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

Inclusion in instruction of words "as charged in the affidavit in this case" is mere surplusage where the instruction, on its face, sets out the essential elements and material substance of charge contained in the affidavit and the granting of the instruction was not reversible error, where there was no dispute of fact that defendant was guilty as charged in the affidavit. *Ball v. State*, 203 Miss. 521, 36 So. 2d 159 (1948), error overruled, 203 Miss. 527, 36 So. 2d 797 (1948).

Instruction in rape prosecution that if jury believed beyond a reasonable doubt that defendant unlawfully, forcibly, and feloniously assaulted prosecutrix, a female over age of 12 years, and put her in fear of great personal violence, and violently, forcibly and feloniously and against her will, ravaged and carnally knew her, at time and place and in manner and form as charged in indictment, it was jury's duty to find defendant guilty, does not refer the jury to the indictment to ascertain the elements of the crime as they sufficiently appear in the instruction. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

Alleged error in prosecution for assault with intent to murder of failure of instructions for state to define the term "murder" used therein, was not available to defendant where his instructions followed the language used by the state, some defining murder in the language of the statute. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

A case in which an instruction did not fully describe the crime held not to be fatal error on appeal. *Sullivan v. State*, 92 Miss. 828, 46 So. 248 (1908).

### 23. —Lesser crimes.

Even though victims' wounds were not very serious, defendant was not entitled to instruction on simple assault, as lesser included offense of aggravated assault, where defendant used gun during assault. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Defendant is not per se entitled to manslaughter instruction in murder case. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence that he did not intend to kill the victim or that the murder was committed in the heat of passion and evidence was presented as to brutal and intentional nature of the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Planning to conduct robbery of home at time when defendant engaged residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction

on lesser included offense on homicide for killing without malice in heat of passion. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Aggravated assault defendant was not entitled to lesser included offense instruction on simple assault given that multiple stab wounds suffered by both victims were serious and life-threatening, and in light of absence of evidence that defendant was merely negligent in handling knife; evidence precluded finding that injuries were negligently inflicted. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Defendant was not entitled to instruction on robbery as lesser included offense of felony murder; because victim died as result of injuries suffered during robbery, if defendant was found guilty of robbery, she was also guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Lesser included offense instruction should be granted unless trial judge can say, taking evidence in light most favorable to defendant and considering all reasonable inferences which may be drawn in favor of defendant, that no reasonable jury could find defendant guilty of a lesser included offense. *Ballenger v. State*, 667

So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction on manslaughter as lesser included offense of capital murder where killing took place during robbery at which defendant was not present. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Transitional jury instruction in capital murder prosecution, stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, was proper and appropriate. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

In a prosecution for sale of a controlled substance, the mere fact that one must possess a controlled substance before he or she can sell it is not enough to require a lesser included offense instruction on possession of a controlled substance. *Reynolds v. State*, 658 So. 2d 852 (Miss. 1995).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting arrest where a reasonable fact-finder could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he "injured" the officer within the meaning of § 97-3-7. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles away where he raped her, cut her throat, and then shot her. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).



When a lesser included offense instruction is requested, the better practice in most cases is for the trial court to give such an instruction, with the important proviso that there be some degree of support in the record. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of misdemeanor child abuse, since no reasonable juror could find that broken glass slivers in an infant's food does not constitute a means likely to cause "serious" bodily injury. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a juror could conclude that the infant accidentally ingested the glass. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

In a prosecution for burglary under § 97-17-33, the trial court did not err in denying an instruction on the lesser included offense of trespass where the defendant argued only that he was not guilty because he had permission to be on the property and that the crime charged should have been "house burglary" rather than "business burglary," and therefore no defense was presented that he was guilty only of trespass. *Wilson v. State*, 639 So. 2d 1326 (Miss. 1994).

In a prosecution for possession of marijuana with intent to sell, the trial court erred in refusing to give a lesser included offense instruction which would have allowed the jury to find the defendant guilty of simple possession of marijuana, even though the defendant's alleged accomplice testified that they intended to sell the marijuana, where the defendant was an admitted marijuana user and the amount of marijuana found was not so large as to preclude the purpose of personal use, since the jury was free to disregard the

alleged accomplice's testimony that the marijuana was for sale. *Perry v. State*, 637 So. 2d 871 (Miss. 1994).

In a prosecution for capital murder, the trial court's failure to instruct the jury on the lesser included offense of simple murder did not constitute reversible error, even though Mississippi law strongly favors the granting of lesser included offense instructions, where the defendant never requested a lesser included offense instruction and failed to object to the court's failure to give one, the record did not support the defendant's assertion that he was entitled to a lesser included offense instruction because the evidence of the three component crimes in the capital murder charge were so intertwined as to be virtually inseparable, and any error was cured by the jury's verdict which by necessary implication found the defendant guilty of simple murder. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it discharged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in § 97-3-19 which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although § 97-3-27 authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. *Griffin v. State*, 557 So. 2d 542 (Miss. 1990).

If the defendant in a murder prosecution were entitled to an instruction on manslaughter, he should have submitted a manslaughter instruction to the trial court. *Shelton v. State*, 274 So. 2d 658 (Miss. 1973).

In prosecution for larceny of a cow where neither the state nor the defendant



requested an instruction that the jury might find the defendant guilty of a lesser constituent offense, the court was without power to so instruct the jury. *Gaston v. State*, 222 Miss. 107, 75 So. 2d 434 (1954).

In prosecution for assault and battery with intent to kill and murder where neither the state nor the accused asked for an instruction authorizing the conviction of simple assault, there was no error where the judge did not give such instruction. *Bland v. State*, 216 Miss. 570, 63 So. 2d 42 (1953).

In prosecution for murder, failure of court to authorize manslaughter verdict is not error where proof showed no element of manslaughter, theory of defense was that of accidental killing, and neither state nor defense requested an instruction on manslaughter. *Hendrix v. State*, 41 So. 2d 48 (Miss. 1949).

Accused cannot complain of failure to instruct on manslaughter in murder trial, where accused has not requested such instruction in writing. *Cosey v. State*, 161 Miss. 747, 138 So. 344 (1931).

However under a prosecution for murder where the evidence does not justify a conviction for murder the court should give an instruction on manslaughter without written request if the evidence authorizes a conviction of manslaughter. *May v. State*, 89 Miss. 291, 42 So. 164 (1906).

## 24. —Credibility of witnesses, generally.

A trial court was correct in refusing to give a defendant's requested instruction regarding eyewitness identification testimony where the only eyewitness to the crime, the victim, testified that she could not identify her assailant. *Thomas v. State*, 645 So. 2d 1345 (Miss. 1994).

A trial court properly refused a defendant's requested cautionary instruction concerning eyewitness identification testimony. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

It was not error for the court to refuse an instruction telling the jury to consider the testimony of a 5-year-old child with precaution. *Ivy v. State*, 522 So. 2d 740 (Miss. 1988).

A jury instruction in a criminal case authorizing the jury to consider the motives and interests of any witness in determining whether the witness would be believed was a direct comment by the court upon the weight of the evidence and credibility of the witnesses in violation of this section and impermissibly chilled the right of a defendant to testify in his own defense. *Sumrall v. State*, 343 So. 2d 481 (Miss. 1977).

An instruction that in determining what weight the jury should give the testimony of any witness, they have the right to consider the demeanor upon the witness stand, what interest, if any, the witness has in the results of the trial, if it has been shown by the evidence that he has any, and all other facts and circumstances in the evidence in the case, is erroneous and, if granted, is ground for a reversal. *Gulf Coast Milling Co. v. Necaise*, 196 So. 2d 363 (Miss. 1967).

In a prosecution under an indictment charging accused with attempt to commit sodomy, the trial court properly refused to instruct that if the jury believed that any witness had knowingly and wilfully testified falsely about any material matter in the case, it had the right to disregard the testimony of such witness. *Taurasi v. State*, 233 Miss. 330, 102 So. 2d 120 (1958).

Where there are several witnesses on a particular issue, the court may instruct the jury in general terms that in passing on testimony of the witnesses they may consider the interest which a witness may have in the result as shown by the evidence. *State v. Jennings*, 50 So. 2d 352 (Miss. 1951).

Refusal of court to instruct jury that if they were to believe the evidence that any witness had theretofore, or on the trial, sworn falsely to any material fact or facts in the case, they might disregard the testimony of each such witness altogether was proper, since such instruction was clearly erroneous as being upon the weight of the evidence and the credibility

of witnesses and fell under the condemnation visited upon the so-called principle of "falsus in uno." *Dolan v. State*, 195 Miss. 154, 13 So. 2d 925 (1943).

Instruction that the jury might disregard the entire testimony of one who had wilfully testified falsely on a material matter in the case, though the testimony of such witness should be corroborated, was properly refused as being not only argumentative but upon the weight of the evidence and the credibility of witnesses. *Dolan v. State*, 195 Miss. 154, 13 So. 2d 925 (1943).

Instruction authorizing jury to disregard the whole testimony of a witness "if they believe it untrue" was meaningless, since it would be presumed that the jury would have disregarded any testimony believed to be untrue in the absence of such an instruction, and therefore it was harmless. *Campbell v. State*, 192 Miss. 49, 4 So. 2d 539 (1941).

Instructing jury that it could consider witness' interest as shown by circumstances held not error under evidence. *Callas v. State*, 151 Miss. 617, 118 So. 447 (1928), overruled, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

An instruction directing the jury that it may consider manner and demeanor of witness and interest he may have, held error. *Hughey v. State*, 106 So. 361 (Miss. 1925).

A witness should not be singled out for attack in any instruction. *Pigott v. State*, 107 Miss. 552, 65 So. 583 (1914); *Holliday v. State*, 108 Miss. 726, 67 So. 181 (1915).

An instruction which authorizes the jury to arbitrarily disbelieve any witness on account of relationship to accused or otherwise is erroneous. *Gables v. State*, 99 Miss. 217, 54 So. 833 (1911); *Poole v. State*, 100 Miss. 158, 56 So. 184 (1911).

It is error for the court to pick out one witness and instruct the jury that he is entitled to as much weight as the other witnesses. *Pederre v. State*, 99 Miss. 171, 54 So. 721 (1911).

An instruction in which the jury is advised they may consider the interest of a witness held to be good. *Waldrop v. State*, 98 Miss. 567, 54 So. 66 (1910).

Where there is more than one witness testifying for defense it is not error to

instruct the jury that in determining weight to be given to testimony they may consider the interest of the party testifying. *Vails v. State*, 94 Miss. 365, 48 So. 725 (1909).

An instruction on the credibility of witnesses is erroneous, which states if any witness has testified falsely to any material matter, jury may disregard it. The false testimony must be knowingly, willfully and corruptly given before the jury is authorized to object to it. *Davis v. State*, 89 Miss. 119, 42 So. 541 (1907); *Bell v. State*, 90 Miss. 104, 43 So. 84 (1907); *Turner v. State*, 95 Miss. 879, 50 So. 629 (1909); *Howell v. State*, 98 Miss. 439, 53 So. 954 (1910); *Waldrop v. State*, 98 Miss. 567, 54 So. 66 (1910); *State v. Wofford*, 99 Miss. 759, 56 So. 162 (1911).

## 25. —Credibility of prosecuting witness.

In a prosecution for simple assault, the defendant was not entitled to have the jury instructed to evaluate the testimony of the victim with caution because he was an admitted drug addict and abuser; such instruction would have been an impermissible comment on the weight of the testimony in violation of this section. *Odom v. State*, 767 So. 2d 242 (Miss. Ct. App. 2000).

In a prosecution for assault on a police officer while acting within the scope of his duty and office, the trial court properly refused to instruct the jury that they were not to give the complaining witness' testimony any added weight merely because he was a law enforcement officer; the requested instruction constituted an impermissible comment upon the weight of evidence. *Stewart v. State*, 355 So. 2d 94 (Miss. 1978).

Where the party raped has testified it is error to instruct the jury that her uncorroborated testimony should be scrutinized with caution, etc. *McArthur v. State*, 105 Miss. 398, 62 So. 417 (1913).

## 26. —Credibility of accused.

Refusal to grant defendant instruction that defendant is competent witness in his own behalf and jury has no right to disregard his testimony or to look upon it with suspicion merely because he is defendant, and if jury has no reason to disbelieve him



other than fact that he is defendant, jury should believe his testimony to be truth, does not constitute error. *Parrett v. State*, 205 Miss. 651, 39 So. 2d 272 (1949); *Clark v. State*, 39 So. 2d 783 (Miss. 1949), suggestion of error overruled on other grounds, 206 Miss. 701, 40 So. 2d 591 (1949).

Where the defendant is only witness it is error for the court to charge the jury that they should consider the interest of witnesses in the result of the trial. *Chatman v. State*, 102 Miss. 179, 59 So. 8 (1912); *Gaines v. State*, 48 So. 182 (Miss. 1909).

Where defendant charged with murder was the only witness in his behalf on key issue of trial, and court charged jury to the effect that it had the right to take into consideration the interest which any witness might feel in result of the case and to give to testimony of each witness only such weight as jury thought it entitled to under all the circumstances, such instruction constituted a comment by court on the testimony as well as upon the weight of the evidence, thereby contravening the express terms of this section, requiring reversal and remand for new trial, and the fatal effect of such an instruction cannot be cured by coupling it with a contradictory instruction to the effect that the testimony of defendant may not be "arbitrarily" disregarded simply because he is the defendant. *Bryson v. State*, 291 So. 2d 693 (Miss. 1974).

Where accused is the only witness in his defense, it is error to charge the jury that in determining the weight of the testimony of witnesses, they may consider their demeanor upon the witness stand and their interest. If any, in the result of the trial. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533 (1959).

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his behalf on the facts of the case, an instruction that if the jury had no other reason to disbelieve the defendant than the fact he was a defendant in the case, it was the jury's sworn duty to believe him, was more than the defendant was entitled to and has been condemned. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533 (1959).

In a prosecution for the sale of intoxicating liquors, since defendant's admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to his credibility as a witness, and the loss or impairment of credibility affected both defendant's character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe from the evidence, beyond a reasonable doubt, that the defendant made the particular sale of liquor, and was not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. *Hassell v. State*, 229 Miss. 824, 92 So. 2d 194 (1957).

In a prosecution for murder, where the defendant was the only witness for the defense as to killing, it is error to instruct that in determining the credibility of any witness they might consider proof of his having made statements which he denies under oath and where the state's witness had testified that he had heard defendant threaten deceased, which was denied by the defendant, the court thinking that this was a suggestion of probable falsity of the testimony assumed the discrediting facts in singling out the testimony in the instruction. *State v. Jennings*, 50 So. 2d 352 (Miss. 1951).

Accused who has testified as witness in his own behalf is entitled to instruction that he is competent witness and that jurors have no right to disbelieve him merely because he is defendant, and his testimony is entitled to such weight, faith and credit as jurors think proper to give it. *Conn v. State*, 205 Miss. 165, 38 So. 2d 697 (1949).

In criminal prosecution, refusal of instruction that, if only reason for disbelieving defendant is his interest, jury has sworn duty to believe he spoke truth, held proper. *Cook v. State*, 150 Miss. 539, 117 So. 344 (1928).

In the trial of a homicide in which the accused was his only witness it was error to charge that the jury should take into consideration his interest in the result of the trial in determining the weight they will give to his evidence. *Smith v. State*, 90



Miss. 111, 43 So. 465, 122 Am. St. R. 313 (1907).

### 27. —Credibility of accomplice.

A trial court in a burglary prosecution erred in refusing to grant a proposed jury instruction that the testimony of an accomplice should be considered with caution, where the witness alleged that she was approached to be a lookout and she wound up with the stolen property, even though she claimed that she bought the property from the defendant. An accomplice for these purposes is a person who is implicated in the commission of a crime; if the evidence admits the reasonable inference that the witness may have been a co-perpetrator or the sole perpetrator, the cautionary instruction should be given. *Burke v. State*, 576 So. 2d 1239 (Miss. 1991).

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25 felonies, and the other accomplice had entered a plea of not guilty to the charge of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. *Wheeler v. State*, 560 So. 2d 171 (Miss. 1990).

When the State is relying on the testimony of coconspirators, a trial judge should not hesitate to grant a cautionary instruction stating that the jury is to regard the testimony with great suspicion and to consider it with caution. Two of the factors in determining whether a trial judge abused his or her discretion in not

granting a cautionary instruction regarding the testimony of an accomplice are (1) whether the witness was in fact an accomplice, and (2) whether the witness' testimony was without corroboration. *Derden v. State*, 522 So. 2d 752 (Miss. 1988), denial of habeas corpus rev'd, 938 F.2d 605 (5th Cir. 1991), reh'g denied, 945 F.2d 403 (5th Cir. 1991), opinion withdrawn, 947 F.2d 147 (5th Cir. 1991), on reh'g, 978 F.2d 1453 (5th Cir. 1992), cert. denied, 508 U.S. 960, 113 S. Ct. 2928, 124 L. Ed. 2d 679 (1993).

An instruction in a homicide prosecution that the testimony of an accomplice which is not unreasonable, improbable, unbelievable, or self-contradictory is alone sufficient to sustain a conviction was error, but not prejudicial where the defendant obtained other instructions relating to the caution and suspicion which jurors should have in mind in considering the testimony of an accomplice to a crime. *Wilson v. State*, 234 So. 2d 303 (Miss. 1970).

A trial court has the power not only to alter or modify a requested instruction, but also the power within its discretion to refuse to grant any instruction regarding the testimony of accomplices, and the refusal to give an instruction to the effect that the law looks with suspicion and distrust on the testimony of any accomplice, and requires the jury to weigh the same with great care and caution was not reversible error. *Robinson v. State*, 219 So. 2d 916 (Miss. 1969).

It is within the discretion of the court whether he shall instruct the jury on request to view testimony of an accomplice with care and caution. *Wellborn v. State*, 140 Miss. 640, 105 So. 769 (1925).

### 28. —Circumstantial evidence.

Trial court was not required to give circumstantial evidence instruction, where defendant had confessed to friend that he killed victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Separate instruction, that state was required to prove capital murder defendant's guilt of unwitnessed killing to exclusion of every other hypothesis

consistent with innocence, was not required on capital murder charge, even though evidence of guilt was circumstantial, given that jury was properly instructed on state's burden as to circumstantial evidence in other instructions. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In a prosecution for possession of marijuana with intent to sell, the defendant was not entitled to a circumstantial evidence instruction requiring the prosecution to prove beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis other than that of guilt, his intent to sell marijuana, since no instruction on circumstantial evidence is necessary where intent alone is sought to be proved by circumstantial evidence. *Jones v. State*, 635 So. 2d 884 (Miss. 1994).

A trial court did not err in denying a capital murder defendant's proposed circumstantial evidence instruction where there was direct evidence in support of the prosecution's charge, consisting of an eyewitness' testimony and another witness' repetition of the defendant's admission. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In a prosecution for grand larceny for the theft of an automobile, the testimony of a highway patrol officer was sufficient to support the denial of a circumstantial evidence instruction, even though the statements were denied, where the officer testified that the defendant told him he had been driving the automobile in question, the defendant told the officer that his papers were in the glove compartment, the officer retrieved the papers and asked the defendant his name, the defendant responded that his name was on the papers, the officer made up a fictitious name and asked the defendant if that was his name, and the defendant responded affirmatively. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

A trial judge did not err in refusing a circumstantial evidence instruction in a

criminal prosecution where the evidence presented by the State was a mixture of both direct and circumstantial evidence, even though most of the evidence was circumstantial. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

A circumstantial evidence instruction was not required in a murder prosecution where witnesses testified as to 2 out-of-court admissions of the murder made by the defendant. While not a "confession," an admission constitutes direct evidence of the crime so that the giving of a circumstantial evidence instruction is not required. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

Circumstantial evidence instructions are required when the prosecution is without a confession and without eyewitnesses to the gravamen of the offense charged. *Simpson v. State*, 553 So. 2d 37 (Miss. 1989).

An instruction stating that the jury must resolve doubt as to facts or circumstances susceptible of 2 interpretations in favor of the accused is required only in entirely circumstantial evidence cases. *Barnes v. State*, 532 So. 2d 1231 (Miss. 1988).

The prosecution's evidence was not wholly circumstantial where the defendant's confession was properly admitted and, therefore, the defendant was not entitled to a circumstantial evidence instruction. *Kniep v. State*, 525 So. 2d 385 (Miss. 1988).

In cases based upon circumstantial evidence, the phrase "to a moral certainty," is interchangeable and synonymous with "beyond a reasonable doubt," and thus is not required; only the additional phrase "and to the exclusion of every other reasonable hypothesis" is required. *Erving v. State*, 427 So. 2d 701 (Miss. 1983).

In a homicide prosecution, failure to give the defendant's requested instruction that the state had the burden of excluding every reasonable hypothesis consistent with the defendant's innocence did not constitute reversible error, even though the state relied on certain circumstantial evidence, where the defendant had admitted to one person that he had shot the deceased, and to another that he had killed the deceased, and these admissions



were admitted by stipulation. *McCraw v. State*, 260 So. 2d 457 (Miss. 1972).

In a murder prosecution in which one element of the crime essential to conviction was established by circumstantial evidence only, it was error to give an instruction offered by the state which did not include the requirement that the state establish guilt to the exclusion of every reasonable hypothesis. *Gilleylen v. State*, 255 So. 2d 661 (Miss. 1971).

In a murder prosecution based on circumstantial evidence, it was error to refuse to grant an instruction requested by the defendant that in order to be sufficient for conviction the evidence must exclude every reasonable hypothesis other than that of guilt. *Pitts v. State*, 241 So. 2d 668 (Miss. 1970).

Where there was eyewitness testimony and the case was based on known facts, an instruction that the state is required to establish the guilt of the defendant beyond any reasonable hypothesis consistent with the innocence of the defendant, usually given in circumstantial evidence cases, was properly refused. *Mangrum v. State*, 232 So. 2d 703 (Miss. 1970).

As a general rule it is only in cases where the evidence is entirely circumstantial that the jury should be required to exclude every other reasonable hypothesis than guilt before a conviction can be had, and in instances where the evidence was not wholly circumstantial an instruction to that effect should not be granted. *Hadley v. State*, 254 Miss. 386, 180 So. 2d 920 (1965).

Where, in a prosecution for manslaughter arising out of an automobile accident, much of the testimony was given by eyewitnesses to the event, the accused could not complain of the court's refusal to give an instruction requiring the jurors to believe the accused guilty beyond every reasonable doubt, and to the exclusion of every reasonable hypothesis before voting to convict, which instruction was applicable to cases resting entirely upon circumstantial evidence. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360 (1958).

Where there is any substantial dispute as to the possession of the stolen property by the accused, the better practice is to instruct that if the jury believes from the

evidence beyond every reasonable doubt that the defendant was in possession of the property and that such property was recently stolen, then such possession is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt of larceny. *Fogle v. State*, 231 Miss. 746, 97 So. 2d 645 (1957).

An accused, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions telling the jury that in order to convict they needed only to believe defendant guilty beyond a reasonable doubt, could not complain that no instruction contained the qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence, where the trial court was not requested to grant such an instruction. *Poole v. State*, 231 Miss. 1, 94 So. 2d 239 (1957).

In a homicide prosecution, where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269 (1956).

Instruction in prosecution for receiving stolen goods that possession of recently stolen property by a defendant is a circumstance strongly indicative of guilt and that it will justify, support, or warrant a verdict for the state, is improper, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

Cases in which an instruction on circumstantial evidence was held to be erroneous. *Williams v. State*, 95 Miss. 671, 49 So. 513 (1909); *Permenter v. State*, 99 Miss. 453, 54 So. 949 (1911); *Simmons v. State*, 105 Miss. 48, 61 So. 826 (1913); *Ellis v. State*, 108 Miss. 62, 66 So. 323 (1914).

A jury should not be instructed that certain evidence is legal and competent. *Williams v. State*, 95 Miss. 671, 49 So. 513 (1909).

The jury should not be instructed that circumstantial evidence is as good as any



other kind. *Haywood v. State*, 90 Miss. 461, 43 So. 614 (1907).

## 29. —Reasonable doubt; murder or homicide cases.

In a prosecution for murder, an instruction for the defendant to the effect that if the jury is not satisfied beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant did wilfully, unlawfully, feloniously, and of malice aforethought, kill and murder the named decedent, then you find defendant not guilty was properly refused; for the instruction is not limited to finding him guilty of murder, but the jury is thereby instructed that granted such findings they could not convict for any offense whatever. *Pitts v. State*, 257 So. 2d 521 (Miss. 1972).

In a murder prosecution, refusal of the trial court to grant an instruction that if the jury should not be satisfied in their own minds beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant had wilfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the victim, then it could not find him guilty of anything, was proper where there was evidence from which the jury was fully justified in returning a verdict of guilty of manslaughter. *Pitts v. State*, 257 So. 2d 521 (Miss. 1972).

In a murder prosecution, it was reversible error to instruct the jury that the presumption of innocence does not shield from punishment one who is in fact guilty, and that, regardless of the presumption of innocence and to the state's burden of proof, the jury had a duty to find the defendant guilty if they believed from the evidence beyond a reasonable doubt that he was guilty. *Gilleylen v. State*, 255 So. 2d 661 (Miss. 1971).

In a murder prosecution based on circumstantial evidence, it was reversible error to charge the jury that it did not have to know that the defendant was guilty in order to convict him, and that all that was necessary for the jury to convict was belief from the evidence beyond a reasonable doubt that he was guilty. *Pitts v. State*, 241 So. 2d 668 (Miss. 1970).

In a murder prosecution, an instruction to the effect that, in order to acquit, the

jury need not be satisfied that the defendant was in fact innocent, but if there should arise from the evidence any reasonable probability of innocence then the defendant should be entitled to acquittal, for a reasonable probability of innocence is always a reasonable doubt of guilt and the probability of innocence need not be as reasonable as the probability of guilt, was an overlong paraphrase of the so-called two-theory type of instruction given in cases resting entirely on circumstantial evidence and would have been confusing and misleading to the jury, and was properly refused, where the issue of the defendant's guilt did not rest entirely on circumstantial evidence and the defendant was granted a detailed instruction covering the same subjects attempted to be set forth in the refused instruction. *United Geophysical Corp. v. Berry*, 230 So. 2d 217 (Miss. 1970).

On a prosecution for murder there was no error in refusing an instruction that the jury might conscientiously believe defendant guilty, yet might not believe it beyond a reasonable doubt, and that in such case they should acquit. *Regan v. State*, 87 Miss. 422, 39 So. 1002 (1905).

On a murder trial an instruction to convict if after considering all the evidence the jury conscientiously believe beyond a reasonable doubt that the defendant is guilty does not in the use of the word "conscientiously" prejudicially qualify the doctrine of reasonable doubt. *Moore v. State*, 86 Miss. 160, 38 So. 504 (1905).

## 30. — —Other cases.

In a prosecution for the sale of cocaine, the trial court did not err in refusing an instruction stating that even if the jury "strongly believe[d]" that the defendant committed the offense, he must be found not guilty if the State failed to prove beyond a reasonable doubt that he sold cocaine. *Moore v. State*, 631 So. 2d 805 (Miss. 1994).

In cases based upon circumstantial evidence, the phrase "to a moral certainty," is interchangeable and synonymous with "beyond a reasonable doubt," and thus is not required; only the additional phrase "and to the exclusion of every other rea-

sonable hypothesis" is required. *Erving v. State*, 427 So. 2d 701 (Miss. 1983).

Where a conviction for embezzlement rested on circumstantial evidence, it was prejudicial error to instruct that the burden on the state was solely that of proving guilt beyond a reasonable doubt rather than to a moral certainty, and to the exclusion of every other reasonable hypothesis except that of guilt, even though there was no request for an instruction as to the exclusion of every other hypothesis since it is the law in criminal cases that where there are two reasonable hypotheses arising out of and supported by the evidence, it is the duty of the jury to adopt the one consistent with innocence even though the hypothesis of guilt be more probable. *Barrett v. State*, 253 So. 2d 806 (Miss. 1971).

A decision of the Mississippi Supreme Court, holding the granting of an instruction that the jury does not have to actually know that a defendant is guilty before it can convict him to be reversible error, would not be applied retroactively. *Johnson v. State*, 252 So. 2d 221 (Miss. 1971), cert. denied, 405 U.S. 991, 92 S. Ct. 1262, 31 L. Ed. 2d 459 (1972).

The giving of the "do not have to know" instruction in a rape prosecution tried before September 28, 1970, was not reversible error. *South Miss. Elec. Power Ass'n v. Pryor*, 246 So. 2d 920 (Miss. 1971).

The giving of an instruction that the jury need not know that the defendant is guilty in order to convict but need only believe beyond a reasonable doubt that he is guilty is reversible error. *Kent v. State*, 241 So. 2d 657 (Miss. 1970).

It was reversible error to grant the state an instruction that in order for the jury to find the defendant guilty it need not know that he was guilty, but only need believe from the evidence beyond a reasonable doubt that he was guilty as charged, and that if the jury did so believe it was under a sworn duty to find the defendant guilty as charged, such instruction having been repeatedly condemned by the Supreme Court of Mississippi. *Spencer v. State*, 240 So. 2d 260 (Miss. 1970).

The instruction that the jury does not have to know that the defendant is guilty of the crime charged in the indictment

before being warranted in convicting him, and that all that the law requires is that the jury must believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged, falls within that class of instructions which would be better not to give but which, in themselves, do not constitute reversible error. *McGill v. State*, 235 So. 2d 451 (Miss. 1970).

In an armed robbery prosecution, an instruction to the effect that the jury did not have to know that the defendant was guilty as charged before it would be justified in convicting him, and that all that the law required was that the jury believe from the evidence beyond a reasonable doubt that the defendant was guilty as charged, was not reversible error. *Graham v. State*, 229 So. 2d 548 (Miss. 1969).

In a prosecution for burglary, an instruction that the jury did not have to know that the defendant was guilty of the crime charged before being warranted in convicting him, but that all that the law required was that the jury must find from the evidence beyond a reasonable doubt that the defendant was guilty, and so believing, it would be the jury's duty to find the defendant guilty as charged, was not reversible error. *Craig v. State*, 222 So. 2d 116 (Miss. 1969).

An instruction for the state to the effect that the jury does not have to know that the defendant is guilty of the crime charged before being warranted in convicting him; but that all the law requires is that the jury must believe from the evidence in the defendant's guilt, is erroneous and defective without a qualifying proviso that the jury must believe in the defendant's guilt from the evidence beyond a reasonable doubt. *Russell v. State*, 220 So. 2d 334 (Miss. 1969).

A defendant, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions telling the jurors that in order to convict they needed only to believe defendant guilty beyond every reasonable doubt, could not complain that no instruction granted him contained the necessary qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence,



where the trial court was not requested to grant such an instruction. *Poole v. State*, 231 Miss. 1, 94 So. 2d 239 (1957).

In a prosecution for the sale of intoxicating liquors, since defendant's admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to his credibility as a witness, and the loss or impairment of credibility affected both defendant's character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe from the evidence, beyond a reasonable doubt, that the defendant made the particular sale of liquor, and that they were not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. *Hassell v. State*, 229 Miss. 824, 92 So. 2d 194 (1957).

In a homicide prosecution, where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269 (1956).

Where the accused's alibi defense to an armed robbery charge was supported by strong testimony of apparently disinterested witnesses while the state's evidence that the accused was the perpetrator was weak, being the testimony of the victim, who, under the circumstances, had only a limited opportunity to observe at the time of the crime, the trial court committed reversible error in failing to instruct that if there was a probability of the accused's innocence, the jury should acquit him; such instruction should have been to the effect that the evidence in support of the alibi need only raise in the minds of the jury reasonable doubt as to the accused's presence at the time and the place of the crime. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375 (1956).

Instruction in prosecution for robbery with firearms which makes effort to define reasonable doubt is bad, but not harmful error when by other instructions defendant has obtained fair and full statement of law applicable to case. *Passons v. State*,

208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Instruction in burglary prosecution that the crime charged may be proven by circumstances, and it is not necessary to have eyewitness to deed if circumstances in evidence are sufficient to create in minds of jury belief that accused is guilty beyond reasonable doubt and to exclusion of every other reasonable hypothesis than that of guilt of accused is correct charge to jury. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Instruction to jury in burglary prosecution that before defendant could be found guilty of charge against him, minds of jury must be satisfied of his guilt beyond every reasonable doubt, and to exclusion of every hypothesis, is more favorable to defendant than applicable law and he suffered nothing by omission of word "reasonable" which should have modified "hypothesis." *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Refusal of defendant's requested instruction in a prosecution for grand larceny that defendant is entitled to the individual verdict of each juror and that any doubts as to defendant's guilt must be resolved in favor of the defendant was proper since the requirement that the doubt must be reasonable was omitted. *Clark v. State*, 39 So. 2d 783 (Miss. 1949), error overruled, 206 Miss. 701, 40 So. 2d 591 (1949).

An instruction that the jury will return a verdict of guilty if "satisfied" that the accused committed the crime charged is erroneous, but not fatally so if another instruction supplies, in haec verba, the missing element "beyond every reasonable doubt." *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

Omission of word "doubt" in sole instruction in larceny prosecution that "if you believe by the evidence beyond all reasonable that the defendant did feloniously take, steal and carry away" the personal property, is reversible error. *Hurst v. State*, 197 Miss. 571, 18 So. 2d 923 (1944).

Omission of words, "from the evidence," in instruction in criminal prosecution for prostitution, that all that was required



was that jury believed that defendant was guilty beyond a reasonable doubt, constituted reversible error, where such defect was not cured by other instructions. *Imbraguglio v. State*, 196 Miss. 515, 18 So. 2d 294 (1944).

Instruction, if defendant's good character with other evidence raised probability of his innocence, there was reasonable doubt of guilt, held properly refused. *Calloway v. State*, 155 Miss. 706, 125 So. 109 (1929).

It is error to omit from the instruction that the jury must acquit the defendant if they have reasonable doubt of his guilt from the evidence or for want of evidence. *Cumberland v. State*, 110 Miss. 521, 70 So. 695 (1916).

An instruction authorizing the conviction of the defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous. The jury should not convict unless satisfied of the guilt beyond every reasonable doubt arising from the evidence. *Jones v. State*, 84 Miss. 194, 36 So. 243 (1904).

### 31. —Self-defense, generally.

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

### 32. —In murder or homicide cases.

A trial court in a murder prosecution committed reversible error when it granted the prosecution's instruction informing the jury that before it could accept the theory of self-defense, it was required to find that the danger was so urgent that the defendant had no "reasonable mode of escape"; this instruction was not supported by law because it deprived the defendant of the right to claim self-defense if he could have avoided the threat to his safety by escaping. *Craig v. State*, 660 So. 2d 1298 (Miss. 1995).

A trial court in a murder prosecution committed reversible error when it refused the defendant's requested instruction that a person "may stand his ground"

without waiving the right to self-defense, so long as "he is in a place where he has a right to be, and is himself in no unlawful enterprise, not the provoker or aggressor in the combat." *Craig v. State*, 660 So. 2d 1298 (Miss. 1995).

A trial court in a murder prosecution did not err in giving an instruction precluding the jury from considering a claim of self-defense if the jury found that the defendant armed himself and sought the victim with the intent of invoking a difficulty with the victim, or voluntarily entered into a difficulty with the victim with the intent to cause serious bodily harm, where the defendant armed himself with a shotgun while he was in no physical danger from the victim, he drove to the victim's house and honked his automobile horn, he drove by the house several times waiting for the victim to appear, and he claimed that he shot at the victim's feet but the trajectory of the shotgun pellets was upward. *Hart v. State*, 637 So. 2d 1329 (Miss. 1994).

In a homicide prosecution, the trial court's giving of an "arming" instruction improperly cut off the jury's consideration of self-defense and constituted reversible error where there was testimony to support the defendant's theory of self-defense, and the instruction stated that the defendant could not plead self-defense if he armed himself with a deadly weapon and either confronted the victim with the intention of causing a difficulty with the victim or voluntarily entered into any difficulty with the victim with the intent to cause serious bodily harm; such "arming" instructions place a higher burden on a defendant to assert a claim of self-defense than is required by law, are looked upon with disfavor, and should rarely be used. *Keys v. State*, 635 So. 2d 845 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error in refusing a requested defense instruction stating that the defendant had a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack, where the prosecuting attorney pointed out in his argument before the jury that the victim was not armed, from which the jury might have

inferred that the defendant was in the wrong in being armed. *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

An instruction estopping one from asserting self-defense is not proper except in the few rare cases where all the elements of estoppel are clearly present; the reason for permitting a self-defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right. *Thompson v. State*, 602 So. 2d 1185 (Miss. 1992).

In a prosecution for murder, jury instructions stating that the defendant could not claim the right of self-defense if he armed himself with a gun in advance and provoked the encounter with the victim were not supported by the evidence where the defendant was the owner and operator of a lounge engaged in the business of selling intoxicating liquor to patrons, the victim had been on the premises most of the day armed with a loaded pistol, the defendant requested the victim to take his pistol and leave, the defendant left to run an errand and when he returned the victim was still in the lounge, intoxicated, and in possession of the pistol, and the ensuing fatal encounter involved disputed facts; moreover, the granting of 2 self-defense instructions did not cure the error since the instructions were conflicting. *Thompson v. State*, 602 So. 2d 1185 (Miss. 1992).

A requested instruction in a prosecution for murder, that if defendant believed that he was threatened with great bodily harm he had a lawful right to carry a concealed deadly weapon, and that while so armed he had a right to use it in his own defense, is proper and not comment on the evidence. *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

It is a rare occasion when an instruction cutting off the right of self-defense is proper in a murder prosecution. *Dismukes v. State*, 285 So. 2d 165 (Miss. 1973).

Where one of defendant's instructions presented to the jury his defense that he was repelling an attack by an armed man and another instruction stated his right of self-defense, a third instruction was properly refused because defendant's defense was that he was being attacked by an armed aggressor, under such claim, an

instruction based on disparity of size of the defendant and victim and on physical conditions of the 2 had no application. *Cochran v. State*, 278 So. 2d 451 (Miss. 1973).

Instruction in manslaughter prosecution that defendant was justified in using a pistol to protect herself from an unjustifiable and deadly attack by the victim if the jury believed that the victim was stronger and physically more powerful than defendant and that defendant was incapable of combating with him in a physical combat, was properly refused where there was no evidence referring to the physical size of either the victim or the defendant nor did it reflect any physical altercation or imminent apprehension of such, and, in fact, the victim and the defendant were separated by the bar of the tavern when the fatal shot was fired. *Smith v. State*, 278 So. 2d 454 (Miss. 1973), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474 (1973).

In a manslaughter prosecution the giving of an instruction that the law tolerates no excuses and accepts no justification for the taking of human life upon the plea of self-defense, unless it be reasonably necessary to save the life of the defendant or save the defendant from great bodily harm at the very time of the fatal shot, was reversible error. *Nicholson v. State*, 243 So. 2d 552 (Miss. 1971).

In a manslaughter prosecution, instructions on the right to "act on appearances" and "self-defense" were properly refused where the defendant had testified that he did not strike the fatal blow and further, having claimed that he himself was knocked down during the affray, said that he could not say who and struck him. *Mangrum v. State*, 232 So. 2d 703 (Miss. 1970).

An instruction that the law tolerates no excuse and accepts no justification for the taking of human life upon the plea of self-defense, unless it be reasonably necessary to save the slayer's life, or to save him from some great bodily harm, at the time of the fatal blow is erroneous, for although the danger must be imminent and impending it need not necessarily occur at the very instant the fatal blow is struck. *Farmer v. Thomas*, 207 So. 2d 96 (Miss. 1968).



A request to instruct in a murder prosecution that jury should not hold defendant to the same calm, cool, clear, collected and precise judgment which they are now able to exercise "but that you should, as nearly as you can, in the place and circumstances at the time of the shooting" and judge whether defendant acted as a reasonably prudent person would have acted under similar circumstances, and if so found, to find him not guilty, is properly denied as so improperly drawn as to confuse the jury. *Robinson v. State*, 234 Miss. 149, 105 So. 2d 766 (1958).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, instructions permitting the jury to find that accused did not kill his father-in-law in necessary self-defense, but had murdered him, constituted reversible error where accused had already been acquitted of the charge of murdering his father-in-law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, the husband, having already been acquitted of the charge of murdering his father-in-law, was entitled to an instruction that if at the time he shot at his father-in-law while acting in necessary self-defense, his wife, without his knowledge, stepped into the line of fire and was accidentally killed, the husband was not guilty of murder. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

Instruction that if jury believed beyond a reasonable doubt that defendant killed victim at a time when he was in no immediate danger, real or apparent, of losing his life or suffering some great bodily harm at the hands of victim, then defendant is guilty, etc., was not erroneous as excluding from consideration of jury that if defendant reasonably believed or had reasonable cause to believe that he was in danger of losing his life or suffering some great bodily harm at the hands of deceased he had a right to take deceased's life in defending himself even though he might have been in no actual danger whatever, especially in view of other in-

structions embodying the principle contended for by defendant. *Johnson v. State*, 46 So. 2d 924 (Miss. 1950).

That an elderly father in ill health who claimed to have shot his robust son as he threateningly advanced upon the father in his bed was denied his defense of self-defense by an instruction that the homicide could not be excused by the mere fact that the defendant was a smaller man than the deceased, of less powerful build and proportions and of greater years, and was assaulted by the deceased with his fists at the time of the slaying, constituted reversible error. *Bailey v. State*, 202 Miss. 221, 31 So. 2d 123 (1947).

An instruction explaining the distinction between murder and manslaughter was sufficient on the issue of self-defense. *Magee v. State*, 200 Miss. 861, 27 So. 2d 767 (1946), suggestion of error sustained, 200 Miss. 861, 28 So. 2d 854 (1947).

The burden of proof is not shifted to the defendant by an instruction that in order to justify a homicide on the plea of self-defense there must be something showed in the conduct of the deceased indicating a present intention to kill or to do some great personal injury to the slayer, and imminent danger of such intention being accomplished. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Instructions in murder prosecution that to justify a homicide on the plea of self-defense, there must be something shown in the conduct of the deceased indicating present intention to kill or to some great personal injury to the slayer, and that there was immediate danger, real or apprehended, of such intention being accomplished, were proper. *Williams v. State*, 14 So. 2d 216 (Miss. 1943).

Although the proof may show that defendant armed himself for the difficulty yet if he abandoned the intent to kill and abandoned the difficulty and did the killing in self-defense afterwards an instruction denying him the right of self-defense is erroneous. *Adams v. State*, 136 Miss. 298, 101 So. 437 (1924).

In a prosecution for homicide, instruction that defendant's belief that he was in danger must have been "honestly enter-



tained" in order to entitle him to rely on self-defense, and another instruction that he must have so believed in good faith, were not erroneous, as indicating that the court doubted the defendant's good faith in killing deceased. *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914).

There is little practical difference in the meaning of the statutory words "reasonable ground to apprehend" and the phrase "good reason to believe," and use of the one for the other did not render instructions erroneous, as imposing too great a burden of proof on defendant. *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914).

Jury should be instructed that if the defendant had reasonable ground to, and did apprehend danger, he might shoot in what he deemed necessary self-defense, and the jury must not hold him to the same cool judgment they were to form, but should put themselves in his place and judge of his acts by the circumstances in which he was situated. *Windham v. State*, 91 Miss. 845, 45 So. 861 (1908).

Error on a trial for homicide, to charge jury that no words used and directed to any person, or assault made on any person with the fist alone, will justify taking of human life, etc. *Taylor v. State*, 89 Miss. 671, 42 So. 608 (1907).

### 33. —In other cases.

In an armed robbery prosecution arising from the defendant's taking of guns from 2 law enforcement officers, the defendant was not entitled to a jury instruction on self-defense, even though the sum and substance of the defendant's defense was that he took the guns with the purpose of disarming the officers in the midst of what had become a dangerous and heated confrontation in order to extricate himself from harm rather than with the intent to steal, where the jury received no fewer than 5 explanations that the "intent to steal" meant the intent to permanently deprive another of personal property, and therefore a self-defense instruction would have added nothing new to the defendant's theory of the case. *Williams v. State*, 590 So. 2d 1374 (Miss. 1991).

In an assault prosecution, in which the defendant slashed the victim across the neck with a knife or a box cutter, the defendant was entitled to an instruction

on self-defense where there was evidence that the victim had struck the defendant with an ice pick. *Anderson v. State*, 571 So. 2d 961 (Miss. 1990).

A trial court erred in granting a jury instruction prohibiting the jury from considering self-defense as a defense in an aggravated assault prosecution where the defendant testified that he was defending himself and his mother substantiated a critical part of his testimony, even though the chief prosecuting witness, along with the victim and the 2 arresting police officers, provided conflicting testimony. The conflicting evidence constituted a factual dispute for the jury to resolve, not the trial judge; it is for the jury to determine the reasonableness of the ground upon which a defendant acts. *Lenard v. State*, 552 So. 2d 93 (Miss. 1989).

Jury instructions indicating that the defendant's verbal abuse of a policeman justified the policeman striking him, and that the defendant was not entitled to the plea of self-defense in assault and battery charges arising out of his severely beating the officer in retaliation, constituted fatal error in that they improperly denied the defendant the plea of self-defense. *Ferguson v. State*, 242 So. 2d 448 (Miss. 1970).

In a prosecution for assault and battery with the intent to kill, the trial court properly refused defendant's instructions which contained inaccurate statements relative to the law of self-defense, and omitted the requirements that the defendant must have been in immediate danger, real or apparent, and that the intent to kill the defendant must have been manifested by some overt act on the part of the victim. *Yarber v. State*, 230 Miss. 746, 93 So. 2d 851 (1957).

### 34. —Defense of another.

A murder defendant was entitled to an instruction informing the jury that self-defense may be applicable to the defense of another person where the evidence showed that the deceased had threatened the defendant's girlfriend. *Calhoun v. State*, 526 So. 2d 531 (Miss. 1988).

### 35. —Burden of proof.

Trial court's jury instructions fairly instructed jury as to state's burden of proof, and thus trial court did not commit re-

versible error by refusing to give defendant's requested jury instruction stating that jury was required to resolve every reasonable doubt in favor of defendant. *Williams v. State*, 667 So. 2d 15 (Miss. 1996).

In a rape prosecution, the trial court did not err in refusing an instruction which stated that the State was required to present evidence "to produce a moral certainty of guilt"; the phrase "to a moral certainty" is confusing and misleading since the State's burden is to prove the defendant's guilt "beyond a reasonable doubt." *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

In the sentencing phase of a capital case, an instruction stating that in order to return the death penalty the jury was required to find that the mitigating circumstances outweighed the aggravating circumstances, did not improperly shift the burden of proof from the prosecution to the defense. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Instruction in grand larceny prosecution that possession or recently stolen property was presumptive proof of defendant's guilt of larceny, and the burden of explaining or accounting for such possession was cast upon the defendant, and when satisfactory explanation was not given, the jury would be warranted in finding him guilty, constituted reversible error. *Hall v. State*, 279 So. 2d 915 (Miss. 1973).

In a homicide prosecution, an instruction that to make a homicide justifiable on the grounds of self-defense, the danger to the slayer must be actual, present and urgent or the slayer must have reasonable grounds to apprehend and in fact apprehend a design on the part of the victim to kill him, or to do him great bodily harm, and in addition there must be imminent danger of such design being accomplished, was not erroneous on the theory that it shifted the burden of proof to the defendant and created confusion. *Turner v. State*, 220 So. 2d 295 (Miss. 1969), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85 (1969).

In a prosecution of a mother for the death of her son due to a beating, the

burden of proving alleged insanity was not placed on accused by an instruction granted to the state that every person under the law is presumed to be sane and responsible for their acts, when that instruction is considered together with the instructions given to the accused as to mental conditions which will relieve one of criminal responsibility. *Burr v. State*, 237 Miss. 338, 114-So. 2d 764 (1959).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's instruction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless. *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236 (1957).

Where the accused's defense to an armed robbery charge was an alibi, the court did not err in failing to give an instruction which would have placed upon the state the burden of proving that the alibi was untrue. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375 (1956).

Jury held improperly instructed where charged that the burden of proving insanity at the time of the alleged assault rested on the defendant. *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949).

The burden of proof is never shifted to the defendant to prove his innocence and an instruction to this effect is erroneous. *Cumberland v. State*, 110 Miss. 521, 70 So. 695 (1916).

It is error to instruct the jury that the burden of proof is on the defendant. *Haley v. State*, 106 Miss. 358, 63 So. 670 (1913).

### 36. —Presumptions, generally.

Granting of an instruction, in a prosecution for assault and battery with intent to kill, that malice aforethought might be assumed from the unlawful and deliberate use of a deadly weapon, constituted reversible error since the instruction was on abstract principle of law, no mention was made of the specific facts of the case, and the two different versions of what had occurred and all of the facts surrounding



the shooting were in evidence. *Allison v. State*, 274 So. 2d 678 (Miss. 1973).

In a homicide prosecution in which the defendant interposed a defense of insanity, a jury instruction that malice would be implied by law from the nature and character of the weapon used, a gun, and that the deliberate use of a deadly weapon in a difficulty but not in necessary self-defense, is evidence of malice, was reversible error. *Coney v. Nolen*, 257 So. 2d 855 (Miss. 1972).

In a prosecution wherein evidence on behalf of the defendant raised a serious question as to whether the defendant was sane at the time of the alleged crime, it was error to instruct the jury that every person under the law is presumed to be sane and responsible for his acts, since the introduction of such evidence imposed on the state the burden of proving to the jury's satisfaction beyond a reasonable doubt that the defendant was sane, and it was then, after the presumption disappeared, for the jury to determine from the evidence whether or not the state had met its burden. *Butler v. State*, 245 So. 2d 605 (Miss. 1971).

In a prosecution for the offense of receiving stolen goods, it was reversible error for the state to obtain an instruction that if the evidence showed that the goods were found in the defendant's possession, and he gave no satisfactory explanation of such possession, there arose a presumption or inference of fact that the defendant received said goods knowing the same to have been lately taken, stolen and carried away. *Mansfield v. State*, 231 So. 2d 774 (Miss. 1970).

An instruction that malice aforethought may be presumed from the unlawful and deliberate use of a deadly weapon should not have been granted. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904 (1965).

Where all facts and circumstances surrounding homicide are fully disclosed by evidence, it is reversible error for court to instruct that law presumes malice from use of deadly weapon. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Law presumes malice from killing of human being with deadly weapon, and this presumption prevails and character-

izes homicide as murder unless facts are introduced in evidence changing character of killing and showing either justification or necessity, but unless facts in evidence explain character of killing, presumption stands and state is entitled to instruction announcing this legal principle. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Instruction, in prosecution for assault with intent to kill, that malice aforethought "may be presumed from the unlawful and deliberate use of a deadly weapon," was proper in absence of evidence showing justification or necessity for assault. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Instruction in prosecution for assault with intent to kill that malice aforethought "may be presumed from unlawful and deliberate use of a deadly weapon," was proper where jury was also charged that burden was upon state to prove malice aforethought beyond every reasonable doubt and that defendant intended to kill his victim. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Instruction that possession of property recently stolen is circumstance which may be considered by jury and from which, in absence of reasonable explanation, jury may infer guilt of larceny, is not error when proof shows that the property was stolen; that the property found in possession of accused was the stolen property; that possession was recently after the larceny and that accused's possession was personal, conscious, exclusive and unexplained by direct or circumstantial evidence which would rebut presumption of taking by accused. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

Where the defendant was charged with receiving stolen goods, an instruction that certain detailed facts, if shown, gave rise to a presumption that the defendant had knowledge of their being stolen property was fatally erroneous. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

When entire case is before a jury, there is no need nor right to charge them upon a presumption. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

Instruction in prosecution for receiving stolen property requiring accused to give a



satisfactory explanation of his possession of such property in order to be relieved of any inference of guilt is erroneous. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

An instruction in which is stated that malice is implied from the use of a deadly weapon although erroneous is not reversible error. *Hardy v. State*, 143 Miss. 352, 108 So. 727 (1926).

Where the evidence shows all the details of the difficulty it is error to instruct the jury that malice is presumed from the deliberate use of a deadly weapon. *Riley v. State*, 109 Miss. 286, 68 So. 250 (1915); *Cumberland v. State*, 110 Miss. 521, 70 So. 695 (1916).

An instruction must not presume, as existing, a disputed fact. *Woods v. State*, 90 Miss. 245, 43 So. 433 (1907).

### 37. —Presumption of innocence.

In criminal case, it is not error to refuse instruction that defendant must be presumed innocent until his guilt is fully established by legal and competent evidence, that this presumption prevails through the trial and that the evidence must be reconciled with it. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

Court did not err in refusing to instruct in trial for grand larceny that presumption of innocence is witness declaring for defendant in thunderous tones that he is innocent and presumption should go into jury room calling upon jury that defendant is innocent until proven guilty beyond every reasonable doubt and to moral certainty. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

Instructions recognizing the presumption of innocence in favor of the accused and the burden of proof throughout the trial as being upon the state, but warning the jury that such presumption of innocence was intended as a shield and safeguard, but not as a shield from punishment to the guilty, that it was simply a humane provision of the law to guard against the conviction of any innocent person, and that if the jury believed from the evidence beyond a reasonable doubt that the defendant was guilty, they should convict, regardless of the presumption of innocence and regardless of the further fact that the burden of proof was upon the

state, did not constitute reversible error. *Williams v. State*, 14 So. 2d 216 (Miss. 1943).

It is fatal error to refuse an instruction that the defendant is presumed to be innocent. *Gentry v. State*, 108 Miss. 505, 66 So. 982 (1915).

The defendant is presumed to be innocent and such presumption attends him throughout the trial and a contrary instruction is erroneous. *Howell v. State*, 98 Miss. 439, 53 So. 954 (1910).

### 38. —Dying declaration.

In a murder prosecution wherein it appeared that at the time of trial sentiment in the community was hostile to the accused, it was reversible error for the trial judge to refuse to instruct on behalf of the accused that dying declarations are a species of hearsay evidence and are not entitled to the same credit and force as if the deceased was alive and testifying in the presence of the jury, under oath, and subject to cross-examination, and that the jury alone were the judges of the weight and force of such dying declarations. *Canon v. State*, 244 Miss. 199, 141 So. 2d 251 (1962).

In a proper case in view of instruction given for the defendant, the court may instruct the jury for the state that it does not intimate the weight the jury should give to a dying declaration but that the jury is the judge of the weight of the evidence. *Wilkerson v. State*, 134 Miss. 853, 98 So. 770 (1923).

The jury is judge of the weight of a dying declaration as evidence and it is error for the court in an instruction to particularize such evidence and in so doing give undue emphasis thereto. *Gurley v. State*, 101 Miss. 190, 57 So. 565 (1912).

### 39. —Punishment.

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in *Coleman v. State* (Miss. 1979) 378 So. 2d 640. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where

the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register



intimates a willingness to resort to violence, and § 97-3-73 — the statute under which the defendant pled guilty—defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. *Conner v.*

*State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction with respect to the "especially heinous, atrocious or cruel" aggravating circumstance did not constitute harmless error where the jury was instructed as to only 2 aggravating circumstances, the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and there was no way of knowing beyond a reasonable doubt that a jury would have found, had it been so instructed, that "the actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S.



Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciousness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of capital murder prosecution, an instruction cautioning

the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, the court properly denied the defendant's requested instruction that the jury "must consider" sympathy and mercy for the defendant, since the instruction was cumulative where another instruction informed the jury that it was required to consider mitigating circumstances if any aggravating circumstances were found to exist. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary to a term not to exceed 20 years. *Flanagan v. National Fire Ins. Co.*, 277 So. 2d 115 (Miss. 1973).

There is no statutory authority for an instruction in a murder case that if the

jury should find the defendant guilty, it should fix punishment as confinement in the penitentiary for life. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

The court did not err in charging that if the accused unlawfully and forceably ravished the prosecuting witness without her consent, the jury might return a verdict finding him guilty as charged in the indictment, in which case it would be the duty of the court to sentence the accused to death in the gas chamber, or find the accused guilty as charged and fix his punishment at life imprisonment, or find the accused guilty as charged but disagree as to the punishment, in which case the court would sentence the accused to the state penitentiary for life. *Drake v. State*, 228 Miss. 589, 89 So. 2d 593 (1956).

In instructing the jury in a murder case as to their power over the punishment to be imposed in case of conviction, the court should exercise care to leave the jury to determine for itself, without any intimation from the court what the punishment should be. *Mathison v. State*, 87 Miss. 739, 40 So. 801 (1906).

#### 40. —Miscellaneous.

Defendant's conviction for capital murder was proper where the trial court properly refused defendant's proffered jury instruction because he was not entitled to a jury instruction that emphasized the evidence of his peaceful character, Miss. Code Ann. § 99-17-35. However, he was entitled to offer his good character as evidence of the improbability that he had committed the act charged, Miss. R. Evid. 404(a)(1). *Brink v. State*, 888 So. 2d 437 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005).

Jury instruction stating that "each person present at the time of, or consenting to and encouraging, aiding or assisting in any material manner in the commission of a crime, or knowingly and wilfully doing any act which is an ingredient in the crime, is ... a principal" did not deem mere knowledge or unknowing assistance sufficient to find one guilty; phrase "knowingly and wilfully" contemplated that accused acted with knowledge and deliberation,

and assistance in commission of crime had to be major. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

There is two-pronged test for deciding whether flight instruction is appropriate: only unexplained flight merits flight instruction, and flight instructions are to be given only in cases where that circumstance has considerable probative value. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Accused has right to have his defenses presented to the jury in jury instruction, but defense must be supported by evidence, however meager it may be. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Giving instruction on intoxication as defense to crime was proper, even though intoxication was not asserted as a defense, where defendant testified he was both drunk and high at time alleged offense occurred, where from that testimony jury could reasonably infer that defendant was not aware of his actions and did not have requisite intent to commit crime, and especially where jury was fully and fairly instructed by other instructions and, when read as a whole, instructions were proper as to state's burden of proof and elements of applicable crimes. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

Evidence that defendant and his friends fled scene in victim's taxicab after shooting victim, stole school bus and drove to Chicago, and there attempted to abduct woman and steal her van, was sufficient to warrant flight instruction in capital murder case, despite evidence that defendant had planned to move to Chicago before shooting victim. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In a prosecution for sale of cocaine, the trial court committed reversible error by deleting a portion of an alibi instruction



stating that the "defendant is not required to establish the truth of the alibi to your satisfaction," since the omitted language was an essential part of the instruction, and the deleted language was not and could not be covered by general instructions on the presumption of innocence. *Jackson v. State*, 645 So. 2d 921 (Miss. 1994).

A trial court erred by reading the Fifth Circuit's "Allen Charge" to the jury when the jury indicated that it was deadlocked, since the only instruction that should be given to a deadlocked jury is the "Sharplin Charge." *Bolton v. State*, 643 So. 2d 942 (Miss. 1994).

A trial court did not err in refusing a defendant's requested instruction that the issue for the jury to determine was not the defendant's guilt or innocence, but was whether or not the prosecution had met its legal burden of proving guilt beyond a reasonable doubt. The instruction given by the court, which told the jury that the defendant was not required to prove his innocence and that the burden was on the State to prove him guilty beyond a reasonable doubt of the crime charged in the indictment before they could convict, sufficiently instructed the jury on the presumption of the defendant's innocence and the State's burden of proof. *Williams v. State*, 589 So. 2d 1278 (Miss. 1991).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

It is better form for the instruction regarding the substantive elements of the offense to be given separately from the form of the verdict instruction; there is a potential for compromise of the jury's perception of a judicial attitude of complete neutrality toward the question of whether a defendant should be found guilty where

the instruction combines the elements of the offense with the form of the verdict. *Doby v. State*, 557 So. 2d 533 (Miss. 1990).

A requested "jury nullification" instruction was properly denied since a defendant does not have the right to an instruction on that point, even though the jury does have the power to acquit for any reason whatsoever. *Rose v. State*, 556 So. 2d 728 (Miss. 1990).

The granting of jury instructions, which did not state the particular county in which the offense occurred, was not error where venue was proven by the testimony of many officers and the defense presented no evidence to rebut that testimony. *Rooks v. State*, 529 So. 2d 546 (Miss. 1988).

It was not error for a trial court to grant a jury instruction as to the form of the verdict which gave the jury the alternative of a guilty verdict first followed by the alternative of a not guilty verdict. *Lee v. State*, 529 So. 2d 181 (Miss. 1988).

Although the "do not have to actually know" instruction does not have the court's "stamp of approval," the instruction correctly states the law as a statement of the mental condition each juror must have in order to return a guilty verdict. A jury could never know with the absolute certainty of the eyewitness whether a defendant was guilty or not guilty. In order to return a verdict of guilty, each juror must be convinced beyond all reasonable doubt that an accused is guilty; while the law requires this absolutely, it does not require more. *Whittington v. State*, 523 So. 2d 966 (Miss. 1988), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323 (1988).

Where a jury in a criminal case is not instructed that its verdict must be unanimous, then a "single juror instruction" stating that a finding of not guilty should be made if a single juror has a reasonable doubt of the defendant's guilt, is proper. Thus, where a jury deliberated for an extended period of time without the benefit of either instruction, the failure to grant the requested single juror instruction was reversible error. *Edlin v. State*, 523 So. 2d 42 (Miss. 1988).

A bailiff's improper communication to the foreman of a deadlocked jury that "the judge said that we had put too much time



and work on this case" constituted reversible error. The judge's subsequent charge to the jury that he would let them continue to deliberate did nothing to remove the taint of the previous impermissible message. Furthermore, the fact that the jury deliberated for approximately 3 ½ hours after receiving the bailiff's message did not demonstrate a lack of coercive effect on the jurors since the length of subsequent deliberations alone cannot remove the taint which an improper communication injects into a jury's verdict. *Edlin v. State*, 523 So. 2d 42 (Miss. 1988).

Although it is a correct statement of the constitutional principle of "jury nullification," a criminal defendant is not entitled to a jury instruction stating that the jury has a right to acquit a criminal defendant for whatever reason even though the evidence may support a conviction, and that this power is an important part of the constitutional scheme of our criminal law system. *Davis v. State*, 520 So. 2d 493 (Miss. 1988).

Defendant's requested instruction to the effect that identity testimony should be scrutinized with extreme care and that no class of testimony is more uncertain or less to be relied upon was a comment upon the weight of the evidence, and the trial judge was correct in refusing to give it. *Ragan v. State*, 318 So. 2d 879 (Miss. 1975).

When the defense is lack of venue, the jury should be instructed to find the defendant not guilty for lack of venue if it finds the venue is in another county or state, since an acquittal solely on the ground of lack of venue will not constitute double jeopardy and by prosecution in the county having venue. *Fabian v. State*, 284 So. 2d 55 (Miss. 1973).

An instruction on an asserted presumption of malice from the use of a deadly weapon is proper only where the testimony failed to establish the circumstances of the use of the weapon; but where the facts have been set forth in the evidence, the question of malice should be left for the consideration of the jury, and the granting of such an instruction would constitute error. *Stewart v. State*, 226 So. 2d 911 (Miss. 1969).

A "falsus in uno, falsus in omnibus" type of instruction is properly refused in a

criminal prosecution. *Fielder v. State*, 235 Miss. 44, 108 So. 2d 590 (1959).

Defendant in a criminal case is entitled to have the jury charged that all twelve jurors must agree before they can return a verdict of guilty, and the refusal of such an instruction is erroneous where the record does not disclose whether the verdict was unanimous. *Markham v. State*, 209 Miss. 135, 46 So. 2d 88 (1950).

Where the sole defense in a criminal prosecution in insanity, it would be error for the court merely to instruct the jury to bring in a verdict of "not guilty" should they so find the defendant; so to do would negative any duty on the part of the jury to comply with Code 1942, § 2575. *State v. Goering*, 200 Miss. 585, 28 So. 2d 248 (1946).

Instruction that if the state failed to prove all the material allegations in the indictment, it was the duty of the jury to find defendant not guilty, was properly refused since it furnished the jury with no acceptable standard by which the quality or degree of proof should be measured. *Dolan v. State*, 195 Miss. 154, 13 So. 2d 925 (1943).

The court is justified in refusing an instruction on "unwritten law." *Clark v. State*, 102 Miss. 768, 59 So. 887 (1912).

Instructions as to the race or color of the defendant should never be given unless the state invokes a rule for the guidance of the jury which directs attention of the jury to the defendant's color, and then the trial court should sua sponte rebuke the state's representative in the presence of the jury. *Clark v. State*, 102 Miss. 768, 59 So. 887 (1912).

#### 41. — —Homicide cases.

Jury instruction that "deliberate design" meant "to kill, without authority of law and not being legally justifiable, legally excusable or under circumstances that would reduce the act to a lesser crime" did not improperly state that deliberate design could be formed at very moment of fatal act or improperly cut off defendant's contention that shooting was in self-defense. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Jury instruction in homicide prosecution, that "deliberate design may be presumed from the unlawful and deliberate

use of a deadly weapon” was reversible error; facts of shooting were set forth in trial, and while testimony was conflicting, question of malice should have been left for consideration of jury. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Giving of flight instruction was reversible error; defendant was arguing self-defense, and jury heard testimony on defendant’s flight, which both defendant and codefendant explained as effort to avoid retribution from homicide victim’s friends. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Where only theory of defense in murder prosecution was self-defense and jury was properly instructed thereon, there was no requirement that court instruct as to other possible theories under which jury could have found homicide to have been justifiable, excusable, or manslaughter. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

Trial court did not mislead jury, in capital murder case involving underlying felony of sexual battery, by instructing that “the fact that the actual moment of the victim’s death may have preceded alleged consummation of the underlying felony of Sexual Battery does not void the charge of Capital Murder,” even though defendant claimed that jury was misled on intent necessary for capital murder as instruction could be correct statement of law only if jury also found that defendant had formed intent to commit sexual battery; when taken in conjunction with other instructions, jury was clearly informed that it must find defendant intended to kill victim while engaged in commission of sexual battery. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In homicide cases, trial court should instruct jury about defendant’s theories of defense, justification, or excuse that are supported by evidence, no matter how meager or unlikely, and trial court’s fail-

ure to do so is error requiring reversal of judgment of conviction. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

A jury instruction in a capital murder prosecution did not violate the due process clause of the 14th Amendment by relieving the State of the burden of proving intent to commit the underlying felonies where the instruction stated that the defendant should be found guilty if he willfully performed “any act which is an element of the crimes with which he is charged or immediately connected with them or leading to their commission.” *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

When an instruction is given on the right to carry a concealed weapon, it should be prefaced with the admonition to the jury that it “should not view as evidence against the defendant that he carried a concealed weapon on his person,” because under the law he did have a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack. *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

A murder defendant was not entitled to a Weathersby instruction where the defendant’s argument that his version of the facts was not contradicted by any credible evidence was based on his discounting the testimony of an eyewitness because her trial testimony differed from the initial statement she gave police and because of her “substantial bias” as the former wife of the victim, the eyewitness’ testimony clearly conflicted with the defendant’s version of the facts, and statements made by the defendant after the homicide were not consistent with his testimony at trial. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

An instruction correctly instructing the jury regarding the law of capital murder and the jury’s duty to follow the law and not “be concerned with the wisdom of any



rule of law" was not improper; an instruction that implicitly condemns jury nullification is not error. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

A trial court did not err in refusing to grant a lesser included offense instruction for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. *Graham v. State*, 582 So. 2d 1014 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the

victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

A defendant who was indicted for murder under § 97-3-19(2)(e) was not entitled to a manslaughter instruction under § 97-3-27, where the victim was beaten to death and the injuries were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A murder defendant was not entitled to a manslaughter instruction where the record contained no evidence from which the jury could determine that the killing resulted from heat of passion and was not the result of malice. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to assist in the murder but that he did participate in kidnapping the victim. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990).

In a murder prosecution, the trial court's instruction to the jury that they



should disregard a remark made in the opening argument for the state, that when violence is being committed daily upon the streets the jury should be careful not to extend sympathy to a person who has committed a crime, was not shown to have been ineffective to cure the harmful effect of the remark, if any. *Smith v. State*, 245 So. 2d 583 (Miss. 1971).

In murder prosecution it is unnecessary and unwise to define malice. *Smith v. State*, 237 Miss. 626, 114 So. 2d 676 (1959).

An instruction that there is no particular time during which it is necessary that an intent to kill should have existed is inaccurate, since the intent must exist at the time injury was inflicted. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

Court did not commit reversible error in refusing the accused's instruction that if he had shot deceased in the lawful defense of his sister-in-law, wife of deceased, the jury should acquit him, in view of insufficient proof that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time he was shot. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461 (1957).

Flight is ordinarily relevant as evidence of guilt and a jury in a murder prosecution should not be instructed that it is not evidence of guilt. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

In murder prosecution, refusal to grant defendant's requested instruction that if jury believed circumstances surrounding defendant at time he made confession were calculated to awaken fear or suspicion against him, that he was ignorant of nature and course of criminal proceedings and was induced by officers to give confession, jury should consider such facts in determining guilt, was not error for reason that requested instruction did not give correct test and court granted defendant instruction that if jury believed alleged confession was brought about by fear, duress, intimidation, or that it was untrue, jury should disregard it. *Pulliam v. State*, 45 So. 2d 578 (Miss. 1950).

It is not error to grant to state manslaughter instruction, where under all of

evidence accused cannot be properly convicted of greater offense than manslaughter and even that offense is not satisfactorily proved beyond every reasonable doubt, as against accused's contention he was either guilty of murder or was justified in committing homicide in necessary self-defense. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

#### 42. — Assault cases.

In a prosecution for aggravated assault, the trial court erred in giving a "flight instruction" where there was an explanation for the defendant's flight implicit in the defense of the case—the defendant's claim of self-defense—and there was ample reason for the defendant to have left the scene of the hostilities based on threats from a third person and the alleged danger from the victim. *Banks v. State*, 631 So. 2d 748 (Miss. 1994).

Where an assault defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value; a flight instruction would have particular prejudicial effect in a case where self-defense is claimed because to suggest and highlight, through the sanction of a court-granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument. *Banks v. State*, 631 So. 2d 748 (Miss. 1994).

In a prosecution for aggravated assault under § 97-3-7(2), the defendant may not have the jury instructed on the lesser offense of simple assault under § 97-3-7(1) where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the injury inflicted was relatively slight. *Hutchinson v. State*, 594 So. 2d 17 (Miss. 1992).

In a prosecution for aggravated assault, the trial court erred in refusing to give a lesser included offense instruction on simple assault where the evidence could have brought the case within the statutory definition of simple assault, even though some of the evidence was contradicted and the jury was not required to believe any of the testimony presented; as long as the evidence "muddies the water enough," the defendant is entitled to the lesser in-

cluded offense instruction. *Robinson v. State*, 571 So. 2d 275 (Miss. 1990).

In prosecution of father and son for assault with intent to kill, an instruction directing the jury that if they believed the son guilty beyond a reasonable doubt as charged and that the father was aiding and abetting therein and commanding those present to stand back during the assault, was erroneous as permitting the jury to believe that commanding the others to stand back was sufficient to constitute guilt. *Burnett v. State*, 192 Miss. 44, 4 So. 2d 541 (1941).

#### 43. — —Larceny, robbery, burglary, or stolen property cases.

Defendant's conviction for armed robbery was proper because his argument that a jury instruction spoke to the weight of the evidence and implied that a gun was unimportant to the state's case was without merit; the jury was presented with direct, uncontradicted testimony from the bank teller that the robber had a gun during the robbery and defendant had actually admitted that he committed the robbery. *Hancock v. State*, — So. 2d —, 2007 Miss. App. LEXIS 35 (Miss. Ct. App. Feb. 6, 2007).

In a prosecution for burglary of an inhabited dwelling, the defendant was not entitled to a lesser included offense instruction on the charge of simple assault where the evidence sufficiently supported a jury determination of the burglary charge, since simple assault is not a constituent offense of burglary of a dwelling. *Ross v. State*, 603 So. 2d 857 (Miss. 1992).

In a prosecution for grand larceny for theft of an automobile, the trial court correctly refused an instruction on the lesser included offense of trespass where the defendant did not claim that he was joyriding or that he was using the vehicle for a brief period and expected to return it, but rather, his defense was an alibi that he was not present when the automobile was stolen. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

A defendant in a burglary prosecution was entitled to an instruction on the lesser included offense of trespass where the person who lived in the house in question testified that the first time the defendant entered her house he did so

without her knowledge or consent and she only discovered him as he came out of her bathroom, and that the second time he entered the house he kicked in the door after she closed the door and locked him out when she went to get some money the defendant claimed he had left inside the house, and another witness testified that the person who lived in the house voluntarily let the defendant in the first time. *Robinson v. State*, 589 So. 2d 116 (Miss. 1991).

In an armed robbery prosecution, an instruction that a double-barreled shotgun, marked as an exhibit, had not been introduced into evidence and should not be considered on the question of the defendant's guilt, was properly refused where two witnesses had identified the gun as the one used by the defendant in the robbery and the defendant had made no effort to discredit the witnesses' testimony as to the gun. *Wilcox v. State*, 241 So. 2d 665 (Miss. 1970).

In a prosecution for larceny in which guilty intent is an element and in which the defense was that accused was too drunk to know what he was doing, it is error to charge that voluntary intoxication is no defense. *Best v. State*, 235 Miss. 318, 108 So. 2d 840 (1959).

In a prosecution for receiving stolen property, a requested instruction that the persons from whom it was received are subject to prosecution for grand larceny is properly refused. *Fielder v. State*, 235 Miss. 44, 108 So. 2d 590 (1959).

In a robbery prosecution of a member of the Negro race, the trial court committed reversible error in failing to instruct the jury to disregard a statement by the district attorney in his argument that "if you don't stop them now, they will next be robbing white people." *Reed v. State*, 232 Miss. 432, 99 So. 2d 455 (1958).

On prosecution for grand larceny, court did not err in refusing to instruct jury that if there is any material fact or circumstances proven by evidence upon which jury can place reasonable construction favorable either to the state or to defendant, it is duty of jury to accept that construction favorable to defendant, although one favorable to state is more reasonable. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).



**44. — —Other cases.**

Jury instruction stating that where person is occupying and exercising control over automobile, he is presumed to be in possession of contents (i.e., drugs found therein) of automobile, was, standing alone, incorrect statement of law concerning constructive possession, for purposes of prosecution for possession of methamphetamine; however, coupled with instruction that spoke to "conscious control" over illegal substance, there was no error looking at jury instructions as whole. (*Per Smith, J., with a Presiding Justice and one Justice concurring, two Justices concurring in result only, and a Presiding Justice concurring and joining in separate concurrence. Townsend v. State, 681 So. 2d 497 (Miss. 1996).*)

In an appeal from a conviction of perjury, the fact that the jury's guilty verdict can be supported by the evidence does not automatically excuse the trial court's failure to give an instruction on the "two witness" rule required in perjury cases. *Hale v. State, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).*

In a prosecution for perjury, the "two witness" instruction should be given even if the defendant fails to request it. *Hale v. State, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).*

In a prosecution for perjury, the trial court's failure to instruct the jury in accordance with the "two witness" rule as required in perjury cases constituted reversible error where one specific witness or piece of documentary evidence could not be singled out as having been sufficient to convict the defendant of perjury. *Hale v. State, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).*

In a rape prosecution arising from the rape of the defendant's 13-year-old daughter, "flight" instructions were properly given, in spite of the defendant's argument that he explained his flight by testifying that he was "shocked," "confused," and "frightened" after being confronted by his wife about his daughter's allegation, where the defendant's uncorroborated explanation was contradicted by the wife who testified that the defendant admitted to her via telephone that he had sex with the daughter. *Evans v. State, 579 So. 2d 1246 (Miss. 1991).*

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the victim to the hospital after the attack. *Taylor v. State, 577 So. 2d 381 (Miss. 1991).*

In a rape prosecution, the trial court properly denied an instruction which stated that the defendant could not be convicted upon the uncorroborated testimony of the prosecutrix since it was an incorrect statement of the law in that it instructed the jury that corroboration of the victim's testimony was necessary. *Allman v. State, 571 So. 2d 244 (Miss. 1990).*

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a \$500 fine and the maximum penalty for aggravated assault carries a 20-year prison term in the penitentiary, while, if



convicted for rape, the defendant would be faced with the possibility of serving a prison term for the remainder of his life. *Boyd v. State*, 557 So. 2d 1178 (Miss. 1989).

The failure to flee is a circumstance indicative of nothing, and is as consistent with guilt as innocence. Thus, a trial court did not err in refusing to grant a reverse flight instruction where the record did not support the defendant's contention that nonflight had considerable probative value of guilt or innocence. *Dennis v. State*, 555 So. 2d 679 (Miss. 1989).

A defendant accused of selling marijuana was entitled to have an entrapment instruction submitted to the jury based on his testimony that he had never made a sale of marijuana before, that he had no plans, intent or disposition to make such a sale, and that, had it not been for the importuning of the Bureau of Narcotics confidential informant, he would not have done so. *King v. State*, 530 So. 2d 1356 (Miss. 1988).

Where the defendant was on trial charged with mayhem under provisions of Code 1942, § 2283, an instruction for the prosecution which used the words "deliberate design" rather than the statutory words, "premeditated design", did not constitute error, for deliberate is a synonym for premeditated. *Emily v. State*, 191 So. 2d 925 (Miss. 1966).

There was no error in an instruction which followed Code 1942, § 2412.5 and told the jury that it could find defendant guilty if he, at the time and place testified to, entered upon the property of another and peeped through the window of the dwelling house of a named person for the lewd, licentious and indecent purpose of spying upon the occupants thereof. *Brown v. State*, 244 Miss. 78, 140 So. 2d 565 (1962).

Since evidence that after the commission of the crime of seduction the accused and the prosecutrix had lived together as man and wife for a number of months informed the jury that subsequent acts of intercourse had been committed, the trial court did not commit prejudicial error in refusing to instruct that if the jury believed that after the alleged crime had occurred, the prosecutrix continued to

have intercourse with the accused, such acts would not affect the guilt of the accused and might be considered by the jury as bearing upon the previous chaste character of the prosecutrix. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

In prosecution under Mississippi Bad Check Law, Code 1942, § 2153, granting of instruction that state has made prima facie case of intent to defraud payee if check is presented to bank on which it was drawn within thirty days after delivery and there is insufficient funds in bank in maker's name to pay check is error, where all facts are in evidence and sharp issue between prosecution and defense is drawn. *Moore v. State*, 205 Miss. 151, 38 So. 2d 693 (1949).

Instruction, if jury believed defendant sold liquor, "as testified to by state's witness," to find defendant guilty, held not prejudicial. *Maxey v. State*, 158 Miss. 444, 130 So. 692 (1930).

#### 45. Review.

Supreme Court does not review jury instructions in isolation. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Defendant convicted of possessing methamphetamine waived appellate review of his claim that trial court erred by refusing his instruction which correctly spoke to jury's need to find that defendant was "beyond a reasonable doubt," "aware of the presence and character of the particular substance \* \* \* and was intentionally and consciously in possession of it"; defense counsel refused to delete portions of that proposed instruction that trial court found offending and superfluous, and defendant, without objection, refused to submit amended version upon trial court's request. *Townsend v. State*, 681 So. 2d 497 (Miss. 1996).

Error could not be predicated on a trial court's refusal of defense instructions where the reviewing court was not provided with a trial transcript of what transpired when the instructions were presented to the trial court; it is the duty of the appellant to see that the record of trial proceedings wherein error is claimed is brought before the reviewing court. *Smith v. State*, 572 So. 2d 847 (Miss. 1990).

When defendant who has failed to renew his motion for directed verdict at

conclusion of all evidence makes motion for new trial and assigns as ground that verdict of jury is not supported by evidence but is contrary to both law and evidence and proof fails to disclose existence of essential element of crime charged, supreme court will reverse conviction and remand case for new trial on ground that verdict is against great weight of evidence rather than reverse case and render judgment, because of failure of defendant to request directed verdict at close of all the evidence. *Smith v. State*, 205 Miss. 170, 38 So. 2d 698 (1949).

The court's failure to give an unrequested instruction is not ground for complaint on appeal. *Grady v. State*, 144 Miss. 778, 110 So. 225 (1926).

The supreme court will not reverse a case merely because of erroneous instructions, unless the party complaining is prejudiced thereby. *Hampton v. State*, 132 Miss. 154, 96 So. 165 (1923).

An assignment predicated error on the modification of an instruction will not be considered unless the record shows the modification. *Hardaway v. State*, 128 Miss. 722, 91 So. 418 (1922).

## RESEARCH REFERENCES

**ALR.** Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 A.L.R.2d 769.

Indoctrination by court of persons summoned for jury service. 89 A.L.R.2d 197.

Propriety of reference, in instruction in criminal case, to juror's duty to God. 39 A.L.R.3d 1445.

Duty of court, in absence of specific request, to instruct on subject of alibi. 72 A.L.R.3d 547.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses. 72 A.L.R.3d 617.

Instructions to jury: Sympathy to accused as appropriate factor in jury consideration. 72 A.L.R.3d 842.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)—modern cases. 97 A.L.R.3d 96.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 A.L.R.4th 118.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 A.L.R.4th 676.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Modern status of rule regarding necessity of instruction on circumstantial evi-

dence in criminal trial—state cases. 36 A.L.R.4th 1046.

Lesser-related state offense instructions: modern status. 50 A.L.R.4th 1081.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner. 70 A.L.R.4th 132.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case. 7 A.L.R. Fed. 377.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge). 44 A.L.R. Fed. 468.

When does trial court's noncompliance with requirement of Rule 30, Federal Rules of Criminal Procedure, that opportunity shall be given to make objection to instructions upon request, out of presence of jury, constitute prejudicial error. 55 A.L.R. Fed. 726.

Propriety, in federal criminal trial, of including in jury instruction statement disparaging defendants' credibility. 59 A.L.R. Fed. 514.

**Am Jur.** 75A Am. Jur. 2d, Trial §§ 1077 et seq.

23A Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 138 et seq. (instructions and admonitions to jury).

**CJS.** 88 C.J.S., Trial §§ 484, 485 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 2:6, 2:7, 34:2, 34:4.

Douthwaite and Eades, Jury Instructions For Personal Injury and Tort Cases (Michie).

Ronald W. Eades, Jury Instructions in Automobile Actions (Michie).

Ronald W. Eades, Jury Instructions in Commercial Litigation (Michie).

Ronald W. Eades, Jury Instructions on Damages in Tort Actions, Fifth Edition (Michie).

Ronald W. Eades, Jury Instructions on Medical Issues, 6th Edition (Michie).

Michie's Jury Instructions on CD-ROM (Michie).

## § 99-17-37. Papers may be carried out by jury.

All papers read in evidence on the trial of any cause may be carried from the bar by the jury.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(80); 1857, ch. 61, art. 157; 1871, § 639; 1880, § 1712; 1892, § 730; Laws, 1906, § 791; Hemingway's 1917, § 575; Laws, 1930, § 584; Laws, 1942, § 1528.

**Cross References** — Jury may take evidence to jury room in civil actions, see § 11-7-151.

Jury taking evidence into the jury room, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.10.

## JUDICIAL DECISIONS

### 1. In general.

The rule that all papers and exhibits which have been received in evidence may be taken to the jury room during deliberation is, within reason, mandatory; the trial court would have discretion to withhold exhibits that might be dangerous or prone to destruction. Thus, a trial court erred when it refused to allow a tape recording of a drug transaction made by the State and introduced into evidence to go to the jury during deliberations. However, the error was harmless where the tape recording was of poor quality, and the jury heard it once in its entirety and then heard certain parts of the recording a second time. *Pettit v. State*, 569 So. 2d 678 (Miss. 1990).

Confession entered into evidence properly submitted to jury and carried into jury room pursuant to statute. *Coulter v. State*, 506 So. 2d 282 (Miss. 1987).

Since an indictment can be read to a jury, it would not be prejudicial to the defendant for the indictment to be carried into the jury room. *Wood v. State*, 275 So. 2d 87 (Miss. 1973).

Trial court did not err in permitting jury to carry indictment into the jury room, and it was not prejudicial on grounds that since the indictment was amended to charge manslaughter instead of murder, it was done by interlining through certain words in a manner which left it still clear to the jury that the grand jury had indicted defendant for murder, and someone was having mercy upon him in trying him for a lesser crime, where the court had instructed the jury that the fact that defendant had been indicted was not evidence of the facts charged in the indictment and should not be considered as evidence of his guilt. *Wood v. State*, 275 So. 2d 87 (Miss. 1973).

Where map was paper read in evidence in arson prosecution, permitting jury to take map to jury room when they retire to consider verdict held not error. *Whittaker v. State*, 169 Miss. 517, 142 So. 474 (1932).

The court should not cause to be withheld from the jury any papers read in evidence on the trial. *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1898).



## RESEARCH REFERENCES

**ALR.** Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case. 37 A.L.R.3d 238.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 A.L.R.4th 626.

**Am Jur.** 75A Am. Jur. 2d, Trial §§ 1665 et seq.

**CJS.** 89 C.J.S., Trial §§ 803, 805 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 30:4, 35:6.

## § 99-17-39. Bills of exceptions; duty of judge to sign.

On the trial of prosecutions for any crime or misdemeanor, it shall be the duty of the judge to sign any bill of exceptions tendered by the defendant during the progress thereof, if the truth of the case be fairly stated therein, and the said exceptions shall be a part of the record of such prosecution.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(145); 1857, ch. 61, art. 163; 1871, § 645; 1880, § 1716; 1892, § 734; Laws, 1906, § 795; Hemingway's 1917, § 579; Laws, 1930, § 588; Laws, 1942, § 1532.

**Cross References** — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

When bills of exceptions to be tendered, and process if judge is incapacitated and can't sign the bill of exceptions, see § 99-17-41.

Attorneys may sign bills of exceptions if judge refuses, see § 99-17-43.

## JUDICIAL DECISIONS

## 1. In general.

Defendant's contention that the district attorney had committed reversible error by referring to another case involving defendant would not be considered on appeal from a murder conviction, where the remark complained of did not appear in the record and where the record reflected only a motion for a bill of exceptions, but no such bill of exceptions appeared in the record. *Coley v. State*, 378 So. 2d 1095 (Miss. 1980).

Where appellant accepted and filed the bill of exceptions as modified by the trial judge, he was bound by its contents and waived any matters not included in it, and he was precluded from relying upon the second bill of exceptions, signed by two attorneys, in which he sought to bring forward certain matters which had been stricken from the original bill by the trial judge. *Edmond v. State*, 312 So. 2d 702 (Miss. 1975).

Where the bill of exceptions to rulings allegedly made during a sanity trial in connection with a criminal prosecution was both imperfect and insufficient, the trial judge did not err in overruling it. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

The object of a bill of exceptions is to put of record occurrences at the trial which are not of record otherwise. *Holmes v. State*, 242 Miss. 407, 134 So. 2d 485 (1961).

Supreme court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defendant, and trial judge was not asked for ruling. *Woods v. State*, 37 So. 2d 319 (Miss. 1948).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review § 490.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 701 et seq. (bill of exception and other similar devices).

6 Am. Jur. Trials, Making and Preserving the Record-Objections, § 31.

**CJS.** 4 C.J.S., Appeal and Error §§ 461 et seq.

## § 99-17-41. Bills of exceptions; when tendered and signed; incapacity of judge.

Bills of exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and signed during the trial, or during the term of the court, and bills of exceptions to judgments overruling motions for new trials must be presented to the judge for his signature during the term or within ten days, or such further time, not exceeding sixty days, as the court may allow, after the end of the term, and must be signed promptly by him if found to be correct. If the death, resignation, or other incapacity of the judge shall prevent him from signing a bill of exceptions, the affidavit of the attorney of record who represented the party tendering the bill of exceptions, and of all of them if more than one, that it correctly states the facts and rulings of the court, shall be received as a substitute for the signature of the judge to it; but in such case, if the state shall file in the supreme court an affidavit that the bill of exceptions is not correct, stating particularly wherein it is not correct, the state may then file any affidavits touching the matter, and the defendant may likewise file any affidavits other than his own up to the time of the call of the case for trial in the supreme court; and said court shall consider and determine, on submission of the case, both as to the truth of the bill of exceptions and the questions involved in what the court may determine to be the bill of exceptions.

**SOURCES:** Codes, 1880, § 1718; 1892, § 735; Laws, 1906, § 796; Hemingway's 1917, § 580; Laws, 1930, § 589; Laws, 1942, § 1533.

**Cross References** — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

Duty of judge to sign bills of exceptions, see § 99-17-39.

Attorneys may sign bills of exceptions if judge refuses, see § 99-17-43.

## JUDICIAL DECISIONS

### 1. In general.

An affidavit of counsel as to what occurred on a certain date with respect to objection to alleged improper argument of prosecuting attorney, which was not in the record of the trial but appended to appellant's brief, could not be considered as part of the record. *Thompson v. State*, 220 Miss. 200, 70 So. 2d 341 (1954).

Alleged improper argument in a criminal case by the prosecuting attorney will not be considered on appeal unless objected to on the trial and a special bill of exceptions be taken and signed during the term. *Powers v. State*, 83 Miss. 691, 36 So. 6 (1904).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review § 490.

6 Am. Jur. Trials, Making and Preserving the Record-Objections, § 31.

**CJS.** 4 C.J.S., Appeal and Error §§ 466, 471.

### § 99-17-43. Bills of exceptions; attorneys may sign if judge refuses.

If the judge shall refuse to sign a bill of exceptions to an opinion, decision, or charge given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge.

**SOURCES:** Codes, 1857, ch. 61, art. 164; 1871, § 646; 1880, § 1717; 1892, § 737; Laws, 1906, § 798; Hemingway's 1917, § 586; Laws, 1930, § 590; Laws, 1942, § 1534.

**Cross References** — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

Duty of judge to sign bill of exceptions, see § 99-17-39.

Substitution for judge's signature in the event judge is unable to sign the bill of exceptions, see § 99-17-41.

## JUDICIAL DECISIONS

1. In general.
2. Sufficiency of signing.

### 1. In general.

In a prosecution for murder, Defendant's contention that the district attorney had committed reversible error by referring to another case involving defendant would not be considered on appeal from a murder conviction, where the remark complained of did not appear in the record and where the record reflected only a motion for a bill of exceptions, but no such bill of exceptions appeared in the record. *Coley v. State*, 378 So. 2d 1095 (Miss. 1980).

Where appellant accepted and filed the bill of exceptions as modified by the trial judge, he was bound by its contents and waived any matters not included in it, and he was precluded from relying upon the second bill of exceptions, signed by two attorneys, in which he sought to bring

forward certain matters which had been stricken from the original bill by the trial judge. *Edmond v. State*, 312 So. 2d 702 (Miss. 1975).

If in fact the bill of exceptions to ruling allegedly made during the sanity trial in connection with a criminal prosecution stated the truth of the matter, a way was open to the appellant to make it available, even though the judge did not sign it. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

The statute provides the only remedy where the judge refuses to sign. *Tatum v. State*, 176 Miss. 571, 169 So. 841 (1936).

Court cannot aid counsel, unable because of circumstances to secure required signature of two attorneys to bill of exceptions, which judge refused to sign, in absence of statutory authority. *Fairley v. State*, 152 Miss. 656, 120 So. 747 (1929).

The statute is constitutional. *Van Buren v. State*, 24 Miss. 512 (1852).



## 2. Sufficiency of signing.

Where the bill of exceptions signed by two attorneys contained no averment or allegation that the trial judge refused to sign the bill as tendered, this section did not become available to or operative in favor of the appellant. *Edmond v. State*, 312 So. 2d 702 (Miss. 1975).

Bill of exceptions not signed by trial judge or by two attorneys other than those representing defendant could not be considered. *Smith v. State*, 158 Miss. 355, 128 So. 891 (1930).

Bill of exceptions which trial judge refused to sign could not be perfected by signature of attorneys representing defendant. *Pittman v. State*, 155 Miss. 745, 124 So. 761 (1929).

Bill of exceptions to district attorney's argument never became part of record, where not signed by attorneys present when judge refused to sign it. *Fairley v. State*, 152 Miss. 656, 120 So. 747 (1929).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review § 490.

**CJS.** 4 C.J.S., Appeal and Error § 466.

## § 99-17-45. Bills of exception; amendment.

Bills of exception, with the approval of the trial judge, may be amended at any time before the hearing on appeal, for the purpose of curing omissions, defects, or inaccuracy; but no such amendment shall be made until the parties interested shall have been given five days' notice of such proposed amendment.

**SOURCES:** Codes, 1806, § 799; Hemingway's 1917, § 587; Laws, 1930, § 591; Laws, 1942, § 1535.

**Cross References** — Amendment of bills of exceptions in civil actions, see § 11-7-211.

## JUDICIAL DECISIONS

1. In general.
2. Illustrative cases.

### 1. In general.

A proposed amendment to a bill of exceptions which gave some support to the defendant's allegation that he had requested, and been denied, a preliminary examination, was not properly a part of the record in the case, where the amendment had not been approved or consented to by the trial court. *Stevenson v. State*, 244 So. 2d 30 (Miss. 1971).

The trial court may amend a special bill of exceptions before the expiration of the term of court. *Archer v. State*, 140 Miss. 597, 105 So. 747 (1925).

### 2. Illustrative cases.

The appellant was entitled to be given leave to amend his bill of exceptions to cure the defects so that his appeal could proceed, notwithstanding that he could have amended or made motion to amend his bill of exceptions from the time that the appellee filed its motion to dismiss until the hearing on that motion over nine months later, because there had been no hearing on the merits of the appeal. *Triplett v. Mayor of Vicksburg*, 758 So. 2d 399 (Miss. 2000).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review § 490.

**CJS.** 4 C.J.S., Appeal and Error §§ 476 et seq.

## § 99-17-47. New trials; terms directed by court; number limited.

Every new trial granted shall be on such terms as the court shall direct. No more than two new trials shall be granted to the same party in any cause.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(73); 1857, ch. 61, art. 165; 1871, § 647; 1880, § 1719; 1892, § 738; Laws, 1906, § 800; Hemingway's 1917, § 588; Laws, 1930, § 592; Laws, 1942, § 1536; Laws, 1956, ch. 230.

**Cross References** — New trials, see Miss. Unif. Cir. & County Ct. Prac. R. 10.05.

## JUDICIAL DECISIONS

1. Power and duty of court generally.
2. Grounds for new trial.
3. —As warranting directed verdict.
4. Limitation on number of new trials.

### 1. Power and duty of court generally.

Presumption of vindictiveness which violates constitutional requirement of due process of law, which applies when accused has received increased sentence upon retrial after having successfully attacked initial conviction on criminal charge, does not apply where accused's guilty plea has been set aside as invalid and sentence imposed after trial is greater than that which had been previously imposed after guilty plea, because increase in sentence is not more likely than not attributable to vindictiveness on part of sentencing judge. *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), on remand, 557 So. 2d 20 (Ala. 1989).

Where the case has been reversed and remanded for a new trial, a trial de novo follows. The trial court hears the case as if for the first time and considers all matters as though there had been no prior trial. As a general rule, when the court reverses and remands, the case is to be tried de novo on all issues. *West v. State*, 519 So. 2d 418 (Miss. 1988).

Where a criminal case has been reversed and remanded for a new trial, a trial de novo follows; the trial court hears

the case as if for the first time and considers all matters as if there had been no prior trial. *West v. State*, 519 So. 2d 418 (Miss. 1988).

Trial or appellate court is rarely justified in setting up its judgment against that of the jury on an issue of fact, but should do so in a proper case. *Conway v. State*, 177 Miss. 461, 171 So. 16 (1936).

### 2. Grounds for new trial.

In a murder case, in view of evidence that (1) defendant and his girlfriend were seen together about 1 ½ hours before her body was found in defendant's truck; (2) the truck was found minutes after defendant reported it stolen by his girlfriend; (3) a bullet in the victim's head came from a .38 caliber gun, and such a gun was recovered from defendant's home; and (4) there were similarities between the bullet recovered from the victim's body and bullets fired from the recovered gun, the trial court properly denied defendant's motion for a new trial. *Rinehart v. State*, 883 So. 2d 573 (Miss. 2004).

Victim's father testified that he had paid between \$ 3,000 and \$ 4,000 for the truck rims; although this was not direct testimony as to the value of the rims, it circumstantially provided a basis for the jury to infer that the rims were worth at least \$ 250; defendant's conviction for attempt to commit grand larceny was therefore appropriate and the trial court did

not err in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. *Smith v. State*, 881 So. 2d 908 (Miss. Ct. App. 2004).

A defendant who was convicted of the sale of cocaine was entitled to a new trial where a confidential informant had told the defendant that the informant owed a third party some money, that he could not go with his "cousin" (an undercover narcotics agent) to get some cocaine, but he would give the defendant \$5 if he would go get it "for him and his cousin," the defendant took the undercover agent to the third party's house and went inside and purchased cocaine for the agent, and there was no evidence of whether the third party was acting on behalf of the narcotics agents. Since the defendant would be entitled to an acquittal on the ground of entrapment if the third party was assisting the narcotics agent, it was relevant for a jury to hear first hand evidence of whether the third party was or was not acting on behalf of the agents, and the State should have been required to provide such evidence. *Daniels v. State*, 569 So. 2d 1174 (Miss. 1990).

District attorney's statement on voir dire, to the effect that trial would not be like one on television and that the jurors could not expect the defendant to confess, was not such improper comment on defendant's right not to testify as to require a new trial. *Bridgeforth v. State*, 498 So. 2d 796 (Miss. 1986).

Conflict of interest on part of assistant district attorney who prosecutes cause after having previously counseled defendant in same matter while attorney was in private practice is ground for new trial notwithstanding defendant's failure to object at outset of trial. *Gray v. State*, 469 So. 2d 1252 (Miss. 1985).

In a burglary prosecution, where the only evidence offered by the state connecting the defendant with the crime in any way was the uncorroborated testimony of an accomplice, who was an admitted narcotics user, and whose testimony was impeached by the unimpeached and uncontradicted testimony of seven alibi witnesses, and the testimony of a medical doctor who was qualified as an expert on

drug addicts to the effect that an addict's reputation for truth and veracity was poor and that he could not be believed under oath, the defendant's motion for a new trial should have been sustained on the ground that the verdict was against the great weight of the evidence. *Hutchins v. State*, 220 So. 2d 276 (Miss. 1969).

Although a separated juror has had communication during a trial with one not a juror, it is not a ground for a new trial if it is affirmatively shown that the separated juror was not so communicated with as to injure the defendant. *Pepper v. State*, 200 Miss. 891, 27 So. 2d 842 (1946).

In the exercise of his authority under this section [Code 1942, § 1536], the trial court in a prosecution charging the defendant with being an accessory before the fact to the crime of robbery should have sustained defendant's motion for a new trial in view of the showing that two self-confessed accomplices contradicted each other in many material particulars with respect to defendant's participation in the crime, the fact that the principal, who admitted his bad reputation, was not corroborated in his testimony that defendant purchased cartridges for the hold-up en route to the scene of the crime, and the fact that the other accomplice escaped indictment by reason of having voluntarily testified before the grand jury, and then later admitted that he had not told the defendant's attorney the truth about the matter, thereby deliberately misleading the attorney in his preparation for the trial. *De Angelo v. State*, 187 Miss. 84, 192 So. 444 (1939).

In murder prosecution of defendant for shooting his brother-in-law, evidence held insufficient to sustain conviction of manslaughter despite dying declaration of brother-in-law accusing defendant, where testimony of eyewitnesses made out a case of self-defense, warranting reversal and remand for new trial. *Conway v. State*, 177 Miss. 461, 171 So. 16 (1936).

### 3. —As warranting directed verdict.

When defendant who has failed to renew his motion for directed verdict at conclusion of all evidence makes motion for new trial and assigns as ground that verdict of jury is not supported by evidence but is contrary to both law and



evidence and proof fails to disclose existence of essential element of crime charged, supreme court will reverse conviction and remand case for new trial on ground that verdict is against great weight of evidence rather than reverse case and render judgment, because of failure of defendant to request directed verdict at close of all the evidence. *Smith v. State*, 205 Miss. 170, 38 So. 2d 698 (1949).

#### 4. Limitation on number of new trials.

In criminal prosecutions, judge may

grant two new trials on ground verdict is against weight of evidence, thereafter jury's judgment controls. *Heflin v. State*, 178 So. 594 (Miss. 1938).

When evidence fails to show defendant's guilt beyond reasonable doubt, court has right under statute to twice set up its judgment against verdict of jury, but after that the jury's verdict must prevail. *Jolly v. State*, 174 So. 244 (Miss. 1937).

### RESEARCH REFERENCES

**ALR.** Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial. 67 A.L.R.2d 191.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time. 69 A.L.R.3d 933.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty. 89 A.L.R.3d 263.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 A.L.R.4th 1208.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 A.L.R.4th 180.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters. 7 A.L.R.4th 942.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 A.L.R.4th 582.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 A.L.R.4th 410.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 A.L.R.4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial or mistrial. 60 A.L.R.4th 1063.

Prosecutor's appeal in criminal case to radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 A.L.R.4th 664.

Standard for granting or denying new trial in state criminal case on basis of recanted testimony—modern cases. 77 A.L.R.4th 1031.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal — Individualized determinations. 104 A.L.R.5th 357.

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial. 44 A.L.R. Fed. 13.

Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure. 51 A.L.R. Fed. 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 A.L.R. Fed. 657.

**Am Jur.** 58 Am. Jur. 2d, New Trial § 7. 8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 385 et seq. (motion

for new trial); Form 401 (order granting or denying motion in arrest of judgment or for new trial).

18A Am. Jur. Pl & Pr Forms (Rev), New Trial, Forms 1 et seq. (notice of motion for

new trial); Forms 21 et seq. (motion for new trial); Forms 171 et seq. (order granting or denying new trial).

CJS. 23A C.J.S., Criminal Law §§ 1924 et seq.

## § 99-17-49. New trials; grant or refusal assignable for error.

When a motion for a new trial shall be granted or refused, either party may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case, and also the decision of the court on said motion, and tender the same as a bill of exceptions; and it shall be the duty of the judge to allow and sign the same. Such bill of exceptions shall be a part of the record in the cause, and it may embrace the motion, the judgment, or other matters of record. The appellant may assign for error that the court below improperly granted or refused a new trial.

**SOURCES:** Codes, 1857, ch. 61, art. 168; 1871, § 648; 1880, § 1720; 1892, § 739; Laws, 1906, § 801; Hemingway's 1917, § 589; Laws, 1930, § 593; Laws, 1942, § 1537.

**Cross References** — Duty of judge to sign bills of exceptions, see § 99-17-39. New trials, see Miss. Unif. Cir. & County Ct. Prac. R. 10.05.

### JUDICIAL DECISIONS

1. In general.
2. Matters assignable as error.
3. Review.

#### 1. In general.

It is not necessary, under the statute, to except to the action of the court in passing upon a motion for a new trial. *State ex rel. Hinds County v. Spengler*, 74 Miss. 129, 20 So. 879 (1896).

#### 2. Matters assignable as error.

In a murder trial defendant cannot claim error in that he was not present when motion for new trial was heard, where contention was neither mentioned to trial court, nor in assignment of errors nor in original brief, but was mentioned for the first time in reply brief on appeal. *Sims v. State*, 209 Miss. 545, 47 So. 2d 849 (1950).

In a motion for a new trial the erroneous rulings assigned as grounds for the motion must be specifically stated. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907); *Borroum v. State*, 94 Miss. 88, 47 So. 480 (1908).

Unless the record shows that the trial judge refused an instruction the same will not be good assignment of error. *Evans v. State*, 87 Miss. 459, 40 So. 8 (1906).

#### 3. Review.

In defendant's burglary trial, although the employee's identification of defendant at a later lineup was not 100 percent positive, the employee concluded that defendant matched the suspect, and police later stopped defendant in the same area, where several burglaries had occurred, and found several speakers in defendant's car that generally matched the stolen speakers; thus, the evidence was sufficient to support the jury's verdict, and defendant's motion for a new trial was properly denied. *Coleman v. State*, 841 So. 2d 1170 (Miss. Ct. App. 2003).

Supreme Court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defen-

dant, and trial judge was not asked for ruling. *Woods v. State*, 37 So. 2d 319 (Miss. 1948).

Unless waived by the state, in criminal case, motion for new trial on ground that verdict of conviction was against overwhelming weight of evidence is necessary before supreme court can consider sufficiency of evidence to support verdict. *Faust v. State*, 204 Miss. 297, 37 So. 2d 315 (1948).

Denial of new trial grounded upon refusal of continuance on account of absence of witnesses by whom defendant claimed he could prove an alibi in prosecution for

grand larceny, was warranted where defendant failed to procure the affidavits of such witnesses as to what their testimony would have been. *Russell v. State*, 203 Miss. 883, 34 So. 2d 722 (1948).

The supreme court is without authority to consider, on motion for certiorari, a prayer that a motion for a new trial made after adjournment of the term be sent up and incorporated into the appeal record. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

### RESEARCH REFERENCES

**ALR.** What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter. 34 A.L.R.2d 1181.

Appeal by state of order granting new trial in criminal case. 95 A.L.R.3d 596.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Prosecutor's appeal in criminal case to radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 A.L.R.4th 664.

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 184 et seq.

5 Am. Jur. 2d, Appellate Review §§ 808 et seq.

6 Am. Jur. Trials, Making and Preserving the Record—Objections, § 31.

**CJS.** 4 C.J.S., Appeal and Error §§ 224 et seq.



## CHAPTER 18

### Mississippi Capital Defense Litigation Act

SEC.

- 99-18-1. Short title.
- 99-18-3. Office of Capital Defense Counsel created; personnel; appointment to office; qualifications; removal.
- 99-18-5. Purpose of office.
- 99-18-7. Duties of office; attorneys appointed to office to be full time.
- 99-18-9. Compensation.
- 99-18-11. Office hours of operation.
- 99-18-13. Powers and duties of director.
- 99-18-15. Director to keep a docket of all indicted death eligible cases in Mississippi.
- 99-18-17. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Defense Counsel Fund.
- 99-18-19. Appointment of counsel; determination of indigence; payment of fees by Capital Defense Counsel Special Fund.

#### § 99-18-1. Short title.

This chapter may be cited as the “Mississippi Capital Defense Litigation Act.”

**SOURCES:** Laws, 2000, ch. 569, § 19, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Office of Indigent Appeals, see § 99-40-1.

#### § 99-18-3. Office of Capital Defense Counsel created; personnel; appointment to office; qualifications; removal.

There is hereby created the Mississippi Office of Capital Defense Counsel. This office shall consist of four (4) attorneys, two (2) investigators, one (1) fiscal officer and two (2) secretaries/paralegals. One of these attorneys shall serve as director of the office. The director shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years or until a successor takes office. The remaining attorneys and other staff shall be appointed by the director of the office and shall serve at the will and pleasure of the director. The director and all other attorneys in the office shall be active members of The Mississippi Bar. The director may be removed by the Governor upon finding that the director is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

**SOURCES:** Laws, 2000, ch. 569, § 20, eff from and after July 1, 2000.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the fourth sentence of Section 20 of Chapter 569, Laws, 2000. The words “advise and consent of the Senate” were changed to “advice and consent of the Senate.” The Joint Committee ratified the correction at its June 29, 2000 meeting.

**§ 99-18-5. Purpose of office.**

The Office of Capital Defense Counsel is created for the purpose of providing representation to indigent parties under indictment for death penalty eligible offenses and to perform such other duties as set forth by law.

**SOURCES:** Laws, 2000, ch. 569, § 21, eff from and after July 1, 2000.

**§ 99-18-7. Duties of office; attorneys appointed to office to be full time.**

The Office of Capital Defense Counsel shall limit its activities to representation of defendants accused of death eligible offenses and ancillary matters related directly to death eligible offenses and other activities expressly authorized by statute. Representation by the office or by other court appointed counsel under this chapter shall terminate upon completion of trial and/or direct appeal. The attorneys appointed to serve in the Office of Capital Defense Counsel shall devote their entire time to the duties of the office, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, engage in lobbying activities for or against the death penalty. Any violation of this provision shall be grounds for termination from employment, in the case of the director by the Governor and in the case of other attorneys by the director with approval of the Governor.

**SOURCES:** Laws, 2000, ch. 569, § 22, eff from and after July 1, 2000.

**§ 99-18-9. Compensation.**

The director appointed under this chapter shall be compensated at no more than the maximum amount allowed by statute for a district attorney, and other attorneys in the office shall be compensated at no more than the maximum amount allowed by statute for an assistant district attorney.

**SOURCES:** Laws, 2000, ch. 569, § 23, eff from and after July 1, 2000.

**Cross References** — District attorneys generally, see §§ 25-31-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

**§ 99-18-11. Office hours of operation.**

The Director of the Capital Defense Counsel Office shall keep the office

open Monday through Friday for not less than eight (8) hours each day and observe such holidays as prescribed by statute.

**SOURCES:** Laws, 2000, ch. 569, § 24, eff from and after July 1, 2000.

### **§ 99-18-13. Powers and duties of director.**

In addition to the authority to represent persons under indictment for death eligible offenses, the director is hereby empowered to pay and disburse salaries, employment benefits and charges relating to employment of staff and to establish their salaries and expenses of the office; to incur and pay travel expenses of staff necessary for the performance of the duties of the office; to rent or lease on such terms as he may think proper such office space as is necessary in the City of Jackson to accommodate the staff; to enter into and perform contracts and to purchase such necessary office supplies and equipment as may be needed for the proper administration of said offices within the funds appropriated for such purpose, and to incur and pay such other expenses as are appropriate and customary to the operation of the office.

**SOURCES:** Laws, 2000, ch. 569, § 25, eff from and after July 1, 2000.

### **§ 99-18-15. Director to keep a docket of all indicted death eligible cases in Mississippi.**

The director shall keep a docket of all indicted death eligible cases originating in the courts of Mississippi which must, at all reasonable times, be open to inspection by the public and must show the county, district and court in which the cause is pending. The director shall prepare and maintain a roster of all death penalty cases in the courts of Mississippi indicating the current status of each case and submit this report to the Governor, Chief Justice of the Supreme Court and the Administrative Office of the Courts monthly. The director shall also report monthly to the Administrative Office of Courts the activities, receipts and expenditures of the office.

**SOURCES:** Laws, 2000, ch. 569, § 26, eff from and after July 1, 2000.

### **§ 99-18-17. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Defense Counsel Fund.**

(1) If at any time during the representation of two (2) or more defendants, the director determines that the interests of those persons are so adverse or hostile they cannot all be represented by the director or his staff without conflict of interest, or if the director shall determine that the volume or number of representations shall so require, the director in his sole discretion, notwithstanding any statute or regulation to the contrary, shall be authorized to employ qualified private counsel. Fees and expenses approved by order of the court of original jurisdiction, including investigative and expert witness



expenses of such private counsel, shall be paid by funds appropriated to the Capital Defense Counsel Fund for this purpose.

(2) There is created in the State Treasury a special fund to be known as the Capital Defense Counsel Fund. The purpose of the fund shall be to provide funding for the Office of Capital Defense Counsel. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Mississippi Office of Capital Defense Counsel. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

- (a) Monies appropriated by the Legislature for the purposes of funding the Office of Capital Defense Counsel;
- (b) The interest accruing to the fund;
- (c) Monies received under the provisions of Section 99-19-73;
- (d) Monies received from the federal government;
- (e) Donations; and
- (f) Monies received from such other sources as may be provided by law.

**SOURCES:** Laws, 2000, ch. 569, § 27; Laws, 2005, ch. 413, § 2, eff from and after July 1, 2005.

**Amendment Notes** — The 2005 amendment added (2); and, in (1), substituted “the Capital Defense Counsel Fund” for “a Capital Defense Counsel Special Fund” and deleted “which fund is hereby created” in the former next-to-last sentence, and deleted the former last sentence which read: “Monies in this fund shall not lapse into the General Fund at the end of the fiscal year but shall remain in the fund and any interest accrued to the fund shall remain in the fund.”

**Cross References** — Payment of fees by the Capital Defense Counsel Fund, see § 99-18-19.

### **§ 99-18-19. Appointment of counsel; determination of indigence; payment of fees by Capital Defense Counsel Special Fund.**

Upon determination of indigence the circuit court may in its discretion, appoint local counsel for the purpose of defending death eligible indigent defendants, the fees and expenses of which shall be paid by the Capital Defense Counsel Special Fund. In the presiding circuit judge’s discretion, a determination of the absence of competent death penalty defense counsel having been made, counsel from the Office of Capital Defense Counsel may be appointed to assist local counsel to defend said case with all fees and expenses to be paid by the Capital Defense Counsel Special Fund.

**SOURCES:** Laws, 2000, ch. 569, § 28, eff from and after July 1, 2000.

**Cross References** — Capital Defense Counsel Fund created, see § 99-18-17.

## CHAPTER 19

### Judgment, Sentence, and Execution

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#### IN GENERAL

SEC.	
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99-19-3.	Convictions obtained only by verdict or guilty plea; no punishment without legal conviction; waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations; definitions.
99-19-5.	Findings of jury.
99-19-7.	Verdict as to some, disagreement as to other defendants.
99-19-9.	No special form of verdict required.
99-19-11.	Verdict may be reformed at the bar if informal or defective.
99-19-12.	Repealed.
99-19-13.	Repealed.
99-19-15.	Sentence; felon under age sixteen.
99-19-17.	Repealed.
99-19-18.	Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds.
99-19-19.	Repealed.
99-19-20.	Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.
99-19-21.	Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended sentence.
99-19-23.	Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.
99-19-25.	Sentence; circuit and county judges and justice courts may suspend in misdemeanor cases.
99-19-27.	Convicts who violate terms of suspended sentence or parole are subject to arrest.
99-19-29.	Vacation of suspended sentence and annulment of conditional pardon for violation of terms.
99-19-31.	Penalty where none fixed elsewhere by statute.
99-19-32.	Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.
99-19-33.	Where penalty modified milder penalty may be imposed.
99-19-35.	Person convicted of certain crimes not to practice medicine or dentistry, or hold office.
99-19-37.	Restoration of right of suffrage to World War veterans.
99-19-39.	Detention of convict pending appeal.

- 99-19-41. Delivery of appellant to county where supreme court is held.
- 99-19-42. Post-conviction proceeding; time for hearing and return to Department of Corrections.
- 99-19-43. Duty of judge when convict sentenced to penitentiary.
- 99-19-45. Commitment to penitentiary; duties of clerks of circuit court; fees.
- 99-19-47. Commitment to penitentiary; form.
- 99-19-48. Placement of person on probation; form for report.
- 99-19-49. Repealed.
- 99-19-51. Manner of execution of death sentence.
- 99-19-53. Execution of death sentence; state executioner.
- 99-19-55. Execution of death sentence; procedure; witnesses; certificate of execution; disposition of body.
- 99-19-57. Execution of death sentence; suspension of sentence when convict is insane or pregnant.
- 99-19-59. Repealed.
- 99-19-61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.
- 99-19-63. Repealed.
- 99-19-65. Collection of fines, penalties, and list reported.
- 99-19-67. Remedy against officer, in reference to fines.
- 99-19-69. Liability of officers for default as to fines.
- 99-19-71. Expunction of misdemeanor conviction of first offender upon petition.
- 99-19-73. Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.
- 99-19-75. Assessment on certain offenses against children to be deposited in Mississippi Children's Trust Fund.

### § 99-19-1. Change of law not to affect prosecution or punishment of crime committed prior to change.

No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding amendatory or repealing statutes, unless otherwise specially provided in such statutes.

**SOURCES:** Codes, 1906, § 1573; Hemingway's 1917, § 1335; Laws, 1930, § 1361; Laws, 1942, § 2608; Laws, 1902, ch. 63.

**Cross References** — Effect of adoption of 1972 Code upon offenses committed theretofore, see § 1-1-23.



## JUDICIAL DECISIONS

1. In general.
2. Post-conviction relief.
3. Retroactive application improper.

**1. In general.**

Trial court erred in not instructing the jury that life without the possibility of parole was an option under Miss. Code Ann. § 97-3-21 because, while the crime occurred prior to the amendment adding that option, the trial took place after the amendment, and under Miss. Code Ann. § 99-19-1, it had previously been held that § 97-3-21 clearly and lawfully directed capital defendants whose pre-trial, trial or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. *Rubenstein v. State*, 941 So. 2d 735 (Miss. 2006).

Judge must consider alternative sentences available and in effect at time crime was committed, and not at time of sentencing, where subsequent amendment of statute limited alternatives available. *Gardner v. State*, 514 So. 2d 292 (Miss. 1987).

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an *ex post facto* law as to persons who were sentenced to death before the enactment of statute. *Wetzel v. Wiggins*, 226 Miss. 671, 85 So. 2d 469 (1956), appeal dismissed, cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39 (1956), reh'g denied, 352 U.S. 919, 77 S. Ct. 217, 1 L. Ed. 2d 125 (1956).

Enactment of statute legalizing sale and possession of beer pending appeal from conviction for possessing beer and intoxicating liquor, held without effect upon conviction. *Brown v. State*, 153 So. 175 (Miss. 1934).

One convicted of arson was properly sentenced under statute in effect when arson was committed, instead of under repealing statute enacted before trial prescribing lighter penalty, absent contrary provision in repealing statute. *Byrd v. State*, 165 Miss. 30, 143 So. 852 (1932).

Under the express provisions of this section [Code 1942, § 2608], a prosecution under a law afterwards repealed does not relieve the defendant of the penalty. *State v. Widman*, 112 Miss. 1, 72 So. 782 (1916).

A person being tried for a first violation cannot justly complain of the fact that pending his prosecution the law has been changed so as to provide a more severe penalty for a subsequent violation. *Britton v. State*, 101 Miss. 584, 58 So. 530 (1912).

**2. Post-conviction relief.**

Defendant's motion for post-conviction relief was properly denied because his sentence was not illegal at the time it was entered and did not become illegal upon the passage of the 2000 amendment to Miss. Code Ann. § 47-5-1003. The revision to § 47-5-1003 relied upon by defendant did not become effective until over a year and a half after his sentencing; while the legislature could have required resentencing under the new provision, it did not do so. *McBride v. State*, — So. 2d —, 2005 Miss. App. LEXIS 314 (Miss. Ct. App. May 10, 2005).

**3. Retroactive application improper.**

Denial of the inmate's petition for post-conviction relief was proper where the revision to Miss. Code Ann. § 47-5-1003 relied upon by him did not become effective until over a year and a half after his sentencing. Thus, his sentence was not illegal at the time it was entered and did not become illegal upon the passage of the revision. *McBride v. State*, 914 So. 2d 260 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

## RESEARCH REFERENCES

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 942 et seq.

**Practice References.** Cipes, Bern-

stein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Su-

preme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and Others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

**§ 99-19-3. Convictions obtained only by verdict or guilty plea; no punishment without legal conviction; waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations; definitions.**

(1) Except as provided in subsection (2) of this section, a person indicted for a criminal offense shall not be convicted thereof, unless by confession of his guilt in open court or by admitting the truth of the charge against him by his plea, or by the verdict of a jury accepted and recorded in court. A person charged with an offense shall not be punished therefor unless legally convicted thereof in a court having jurisdiction of the cause and of the person.

(2) In all cases in the circuit, county, justice and municipal courts involving a traffic misdemeanor violation or a game and fish misdemeanor violation where a person has been issued a ticket or has been formally charged by affidavit, indictment or information and desires to waive a trial and not appear in court and defend the charge, the amount of the fine, in the discretion of the court, may be paid in advance to the clerk of the court. When the fine is paid in advance, the person cited must be notified by language plainly printed on a waiver form or the ticket of the person's right to a trial and the consequences of the voluntary advance payment of the fine. In cases where formal charges have been made and the person charged has been notified to appear in court at a certain date and time, the clerk of the court is authorized to accept a cash appearance bond, not to exceed the amount of the fine, conditioned upon the appearance of the person in court at the cited date and time. In the event of default, the cash appearance bond may be forfeited in payment of any judgment in the case in an amount not to exceed the amount of the bond; and in such cases of cash appearance bond forfeiture, it shall be final without necessity of judgment nisi and issuance of the writ of scire facias. In the event a person so cited or charged pays a fine in advance after notice of the person's rights, this shall constitute a waiver of formal charge, arraignment and trial; and in such cases and in cases of default on cash appearance bond, such action shall be a plea of nolo contendere by such person and the court, upon the advance payment of fine or the default on cash appearance bond, may convict the person of the offense stated in the ticket or formal charges without further appearance by the person. Traffic convictions shall be reported to the Commissioner of Public Safety as required by law and convictions for any offense charged by a conservation officer shall be reported to the Commissioner of Wildlife, Fisheries and Parks as required by law. It

shall not be necessary to enter traffic misdemeanor cases in the municipal court docket.

(3) For the purposes of this section:

(a) The term “fine” means, in addition to the pecuniary punishment, all fees, costs, assessments and other charges required by law to be imposed in such cases.

(b) The term “traffic misdemeanor” means a violation of traffic or motor vehicle laws that do not require mandatory imprisonment upon conviction but shall not include repeat offenders where a sentence of imprisonment is likely and shall not include charges under the Mississippi Implied Consent Law.

(c) The term “game and fish misdemeanor” means a violation not punishable by imprisonment and charged by a conservation officer.

**SOURCES:** Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 1(4); 1857, ch. 64, art. 359; 1871, § 2866; 1880, § 3101; 1892, § 1456; Laws, 1906, § 1529; Hemingway’s 1917, § 1291; Laws, 1930, § 1316; Laws, 1942, § 2564; Laws, 2002, ch. 320, § 1, eff from and after July 1, 2002.

**Cross References** — Conservation officer’s generally, see § 49-1-13.

Mississippi Implied Consent Law, see §§ 63-11-1 et seq.

Procedures in criminal cases — minimum fine which may be imposed, see § 99-33-3.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Competency of defendant.
3. Withdrawal or vacating of guilty plea properly denied.
4. When defendant may withdraw guilty plea.
5. When plea agreement may be withdrawn; by whom.
6. Plea to lesser included offense.
7. Attorney’s entry of guilty plea for defendant.
8. Confession.

### 1. In general.

While defendant did not specifically state at the plea hearing that he had killed the victim, the State indicated that defendant had given two statements, one oral and one written, wherein he confessed to killing the victim, and at the hearing, defendant admitted that he had committed robbery; the trial court was entitled to place great emphasis upon statements made under oath in open court during plea proceedings and sentencing.

Smith v. State, 910 So. 2d 635 (Miss. Ct. App. 2005).

Guilty plea is voluntary if defendant knows what elements are in charge against him or her, including understanding of charges and its relation to defendant, effect of plea, and possible sentence. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

Complete record should be made of plea proceeding to ensure that defendant’s plea was entered voluntarily. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

No evidence in record indicated that defendant accused of possession of cocaine was ever legally convicted based upon confession, plea of guilty or jury verdict; confusion of prosecutor, defense counsel and trial judge apparently transformed interrupted suppression hearing into hearing on merits even before motion to suppress was decided, and resulted in conclusion of sentencing hearing with sentence contingent on evidentiary ruling and no conclusive finding of guilt. Chunn v. State, 669 So. 2d 29 (Miss. 1996).



Admission of guilt is not a constitutional requisite of an enforceable plea. *Reynolds v. State*, 521 So. 2d 914 (Miss. 1988).

This section [Code 1942, § 2564] precludes a nolo contendere plea in a felony case. *Bruno v. Cook*, 224 So. 2d 567 (Miss. 1969).

## **2. Competency of defendant.**

Where the accused in grand larceny prosecution was totally illiterate and of questionable mental competence, his tendered plea of guilty should not have been accepted until the judge had determined that the accused was competent to understand the nature and consequences of the plea, had advised accused of his basic rights, and ascertained that the plea was voluntary. *Caves v. State*, 244 Miss. 853, 147 So. 2d 632 (1962).

## **3. Withdrawal or vacating of guilty plea properly denied.**

A circuit court properly summarily dismissed a defendant's post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel, where a transcript of the plea hearing showed that the trial court fully informed the defendant of the maximum sentence for the crime charged in the indictment and the effect of the habitual criminal statute if he subsequently committed another crime of violence and that the defendant acknowledged to the court that no one had threatened, abused or mistreated him in any way or promised him anything to cause him to wish to plead guilty, and the defendant did not contend that he lied to the court because of misrepresentations by his attorney. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A circuit court properly summarily denied a defendant's post-conviction relief motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. *Lott v. State*, 597 So. 2d 627 (Miss. 1992).

There was no error in the trial court's refusal to allow a defendant, who had pled guilty to a charge of possession of marijuana, without representation by counsel but after a full inquiry by the court as to the defendant's understanding of his rights, to allow the defendant to withdraw his plea, notwithstanding that the defendant claimed that he had been induced by the county attorney's promise of a light sentence to plead guilty without representation by counsel. *Debrow v. State*, 235 So. 2d 712 (Miss. 1970).

Overruling of motion to withdraw plea of guilty after conviction of unlawful possession of intoxicating liquor and to enter plea of not guilty was proper where motion did not allege defendant was innocent of the offense charged or any facts upon which innocence could be assumed or a legal defense predicated. *Edwards v. State*, 209 Miss. 325, 46 So. 2d 790 (1950).

## **4. When defendant may withdraw guilty plea.**

Before a person may plead guilty to a felony, he or she must be informed of his or her rights, the nature and consequences of the act he or she contemplates, and any other relevant facts and circumstances. Thus, a defendant who was not advised of the mandatory minimum sentence for the

charge to which he was pleading, and who was ignorant of the mandatory minimum sentence at the time he plead guilty, was entitled to withdraw his plea of guilty, enter a plea of not guilty and be given a trial, since the failure to advise the defendant of the minimum penalty rendered his guilty plea involuntary as a matter of law. *Vittitoe v. State*, 556 So. 2d 1062 (Miss. 1990).

Mistaken advice of counsel may in some cases vitiate a guilty plea. Counsel's representation that a specified minimal sentence will be received may render a guilt plea involuntary but "mere expectation or hope" is not sufficient. *Gardner v. State*, 531 So. 2d 805 (Miss. 1988).

When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. *Reynolds v. State*, 521 So. 2d 914 (Miss. 1988).

#### **5. When plea agreement may be withdrawn; by whom.**

A district attorney did not have unilateral authority to rescind a plea bargain agreement on the basis that the defendant had lied to him about certain key information even though the language of the "memorandum of understanding" gave the district attorney the right to rescind the agreement at any point if the defendant was untruthful. The question of whether a defendant failed to perform a condition precedent is an issue not to be finally determined unilaterally by the government, but by the court on the basis of adequate evidence. *Danley v. State*, 540 So. 2d 619 (Miss. 1988).

State court's affirmance of a criminal conviction, entered on a guilty plea, was vacated and the case remanded, where the prosecution, contrary to a "plea bargaining" agreement, had recommended the maximum sentence and such maximum sentence was imposed. *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), on remand, 39 App. Div. 2d 654, 331 N.Y.S.2d 776 (1st Dep't 1972).

#### **6. Plea to lesser included offense.**

Circuit court had jurisdiction to accept guilty plea from defendant to grand larceny offenses, adjudge him guilty, and

impose sentence even though defendant appeared on indictment charging burglaries since defendant could have been tried and convicted of grand larceny upon request that lesser offense of grand larceny be considered if he had gone to trial on burglary charges. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

Court having subject matter jurisdiction is empowered to proceed once indictment has been served on defendant, and subsequent guilty plea to lesser related offense does not deprive court of personal jurisdiction over defendant. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. *Grayer v. State*, 519 So. 2d 438 (Miss. 1988).

#### **7. Attorney's entry of guilty plea for defendant.**

One charged with a felony must plead to an indictment in person, and a plea of "guilty" entered by his attorney is invalid. *Mareno v. State*, 226 So. 2d 905 (Miss. 1969).

#### **8. Confession.**

Inmate's petition for post-conviction relief was properly denied because a plea of guilty during a plea hearing was sufficient to constitute an admission of guilt to the charge of capital murder. *Daughtery v. State*, 847 So. 2d 284 (Miss. Ct. App. 2003).

The provisions of this section for the conviction of a person upon "a confession of his guilt in open court or by admitting the truth of the charge against him" apply only when the confession or admission is made to the charge for which the defendant is then being tried. Thus, in a prosecution of two defendants for spotlighting deer following their conviction in a justice of the peace court, the circuit court erred in convicting them of unlawfully hunting from a public road based upon admissions or confessions made during trial where the only offense for which they were on trial was that of spotlighting deer.



Sanchez v. State, 385 So. 2d 624 (Miss. 1980).

### ATTORNEY GENERAL OPINIONS

Following the 2002 amendment of the statute, guilty or nolo contendere pleas for misdemeanor cases in municipal court, other than misdemeanor traffic violations

and misdemeanor game and fish violations, must be accepted by a judge and not the municipal court clerk. Payne, May 10, 2002, A.G. Op. #02-0240.

### RESEARCH REFERENCES

**ALR.** Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 A.L.R.2d 549.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 A.L.R.3d 281.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 A.L.R.3d 1291.

Right to withdraw guilty plea in state criminal proceedings where court refuses to grant concession contemplated by plea bargain. 66 A.L.R.3d 902.

Validity and efficacy of accused's waiver of unanimous verdict. 97 A.L.R.3d 1253.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 A.L.R.4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 A.L.R.4th 251.

Power of court to increase severity of unlawful sentence—modern status. 28 A.L.R.4th 147.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 A.L.R.4th 504.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession. 51 A.L.R.4th 495.

Prohibition of federal trial judge's participation in plea bargaining negotiations under Rule 11(e)(1) of the Federal Rules of Criminal Procedure. 56 A.L.R. Fed. 529.

**Lawyers' Edition.** Validity of guilty pleas. 25 L. Ed. 2d 1025.

### § 99-19-5. Findings of jury.

(1) On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

(2) For purposes of this section, manslaughter shall be considered a lesser included offense of murder and capital murder, and the jury may be properly instructed thereon, upon request by either party or upon the court's own motion, in any case in which the giving of such instruction would be justified by the proof, consistent with the wording of the applicable manslaughter statute.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8(22); 1857, ch. 64, art. 305; 1871, § 2809; 1880, § 3078; 1892, § 1426; Laws, 1906, § 1499; Heming-



way's 1917, § 1257; Laws, 1930, § 1280; Laws, 1942, § 2523; Laws, 2004, ch. 393, § 3, eff from and after passage (approved Apr. 20, 2004.)

**Cross References** — Murder, capital murder, lesser included offenses defined, see § 97-3-19.

Verdicts, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

## JUDICIAL DECISIONS

1. In general.
2. Attempts.
3. Lesser included offenses.
4. Lesser nonincluded offenses.

### 1. In general.

Defendant admitted and the record revealed that defendant, not the State, requested the accessory after the fact instruction. Thus, defendant could not complain on appeal that the instruction was erroneously granted. *Parks v. State*, 884 So. 2d 738 (Miss. 2004).

This section authorizes only convictions of inferior constituent offenses unless there be an additional count in the indictment. *Hailey v. State*, 537 So. 2d 411 (Miss. 1988).

On indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense. *Callahan v. State*, 419 So. 2d 165 (Miss. 1982).

On indictment for any offense the jury may find the defendant guilty of the offense as charged or of attempt to commit the same offense or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose. *Simmons v. Bonslagel*, 272 So. 2d 664 (Miss. 1973).

A conviction under indictment charging assault and battery "with intent to commit manslaughter" is a conviction of the assault and battery only. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 131 Am. St. R. 511 (1907).

### 2. Attempts.

Because the information did not sufficiently charge defendant with armed robbery,

as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. *Hughes v. State*, 665 So. 2d 852 (Miss. 1995).

In a prosecution on a charge of having pointed and aimed a gun at another person, where the evidence offered by the state tended to show that defendant went into his house, obtained a gun, came out on the front porch in a scuffle with his wife over the weapon and was prevented by her from raising it to a position where it could be either pointed or aimed at anyone, the defendant was not entitled to a peremptory instruction, since under the proof the jury might have been entitled to convict him of an attempt to commit the offense charged. *Austin v. State*, 192 Miss. 342, 6 So. 2d 121 (1942).

It is not reversible error for the court to refuse an instruction informing the jury that it will find defendants not guilty unless it believes certain hypotheses which omit the hypothesis of attempt to commit the crime. *Chandler v. State*, 143 Miss. 312, 108 So. 723 (1926).

Supreme court will not reverse conviction for attempt to commit crime for refusal of instruction to find defendant guilty, unless jury believe certain hypotheses omitting the hypothesis of attempt to

commit the crime. *Chandler v. State*, 143 Miss. 312, 108 So. 723 (1926).

It is proper to refuse to charge that defendant on trial for rape cannot be convicted of an attempt to rape, though the indictment does not contain a count charging such attempt. *Horton v. State*, 84 Miss. 473, 36 So. 1033 (1904).

### 3. Lesser included offenses.

Elements for the charge of sale of cocaine as listed in Miss. Code Ann. § 41-29-139 were necessarily included to prove the crime of sale of cocaine while in possession of a firearm under Miss. Code Ann. § 41-29-152, as § 41-29-152 simply provided for an enhanced penalty for the commission of a crime under § 41-29-139, but it was still necessary that each element of the charged offense under § 41-29-139 be proven; the jury was properly instructed that defendant could be found guilty of sale of cocaine, a lesser-included offense to the charge of sale of cocaine while in possession of a firearm, and thus pursuant to Miss. Code Ann. § 99-19-5(1), there was no merit to the argument that the indictment against was not valid because a lesser-included offense was not stated. *Davis v. State*, 950 So. 2d 1073 (Miss. Ct. App. 2007).

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the victim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. *Friley v. State*, 879 So. 2d 1031 (Miss. 2004).

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann. § 97-5-39(2), but was a lesser nonincluded offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the

giving of the instruction but had requested it be given. *Moore v. State*, 799 So. 2d 89 (Miss. 2001).

Decision that the directed verdict on the charge listed in the indictment acted as directed verdict as to all lesser-included offenses of that charge unless the lesser offenses were pleaded in the indictment did not nullify Miss. Code Ann. § 99-19-5, allowing a jury to find guilt of any inferior offense the commission of which was necessarily included in the offense charged. *Fulcher v. State*, 805 So. 2d 556 (Miss. Ct. App. 2000).

If there is a court-directed verdict as to the principal offense, the court cannot thereafter instruct the jury on a lesser included offense that was not alleged in the indictment. *Fulcher v. State*, — So. 2d —, 2000 Miss. App. LEXIS 570 (Miss. Ct. App. Dec. 12, 2000).

In a prosecution for aggravated assault, the court properly instructed the jury with regard to simple assault as a lesser included offense where the state presented a witness claiming there was serious bodily injury and the defense brought forth a witness that the injuries were not serious. *Odom v. State*, 767 So. 2d 242 (Miss. Ct. App. 2000).

In first-degree murder case, where trial court instructed on second-degree murder but did not require jury to agree on single theory of first-degree murder, defendant was not entitled as matter of due process to instruction on lesser included offense of robbery, where (a) jury had been instructed on lesser offense of second-degree murder as alternative to either finding guilt of first-degree murder or acquitting defendant, and (b) evidence would have supported second-degree murder conviction; due process concern with eliminating distortion of fact-finding process, which is created when jury is faced with all-or-nothing choice between murder and innocence, was not implicated. *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), reh'g denied, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109 (1991).

Under the constitutions of both the United States and the State of Mississippi and under this section, a jury instruction on child fondling should not have been



given where the indictment charged only forcible rape since child fondling is not a necessarily included offense of forcible rape and, therefore, the indictment did not sufficiently notify the defendant that he might face a charge of child fondling. *Hailey v. State*, 537 So. 2d 411 (Miss. 1988).

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. *Harveston v. State*, 493 So. 2d 365 (Miss. 1986).

A simple assault is a constituent or lesser included offense of aggravated assault. *Callahan v. State*, 419 So. 2d 165 (Miss. 1982).

In a prosecution for robbery, it was not error for the trial court to refuse the defendant's requested instruction on the lesser included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. *Presley v. State*, 321 So. 2d 309 (Miss. 1975).

The charge of possession and delivery of marijuana is a constituent part of the charge of the sale of marijuana. *Jones v. State*, 279 So. 2d 650 (Miss. 1973).

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. *Auman v. State*, 271 So. 2d 427 (Miss. 1973).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432 (Miss. 1968).

Where indictment attempting to charge defendant with felonious commission of the act constituting a third offense was void in its entirety for failure to charge his conviction of a first offense as a first offense, and his conviction of a second offense as a second offense, all under the same statute (Code 1942, § 2613, dealing with unlawful acts with regard to intoxicating liquors), trial court erred in failing to sustain demurrer thereto and in permitting amendment of indictment so as to charge a first offense; and no effect could be given such indictment under this section [Code 1942, § 2523], authorizing a conviction for the commission of some other offense, the commission of which is necessarily included in the offense with which the defendant is charged in the indictment, since it neither charged a third offense nor any constituent offense. *Ainsworth v. State*, 206 Miss. 559, 40 So. 2d 298 (1949).

Where the evidence would justify a conviction of murder, the defendant may not complain of a conviction of the lesser offense of manslaughter, nor of an instruction covering such offense. *Huffman v. State*, 192 Miss. 375, 6 So. 2d 124 (1942).

In prosecution under indictment charging robbery with deadly weapon accused could be found guilty of robbery without firearms under statute providing accused may be found guilty of lesser offense or other offense necessarily included in offense charged. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

Assault with intent is not within statutory indictment for murder. *Bell v. State*, 149 Miss. 745, 115 So. 896 (1928).

An indictment held not defective for failure to properly charge intent to kill and murder, where the conviction was only for assault and battery. *Bailey v. State*, 146 Miss. 588, 111 So. 586 (1927).

The statutory indictment for murder does not include an assault and battery with intent to murder and a conviction of the latter thereunder is not warranted. *Scott v. State*, 60 Miss. 268 (1882).

The statutory indictment for murder does not include an assault and battery and a conviction of the latter under such an indictment is not warranted. *Moore v. State*, 59 Miss. 25 (1881).



Under an indictment for an assault with intent to kill and murder, the accused may be convicted of an assault. *Bedell v. State*, 50 Miss. 492 (1874).

#### 4. Lesser nonincluded offenses.

Where defendant was indicted for sexual battery, it was not plain error for the trial court to convict defendant of the crime of touching and handling a child for lustful purposes; unlawful touching was not a lesser-included offense of sexual battery, however, unlike in *Friley v. State*; not only did defendant not object to the lesser offense instruction, defendant offered an instruction on the form of verdict that asked the jury to determine whether defendant was guilty of the lesser crime of touching and handling a child for lustful purposes. *Dupuis v. State*, — So. 2d —, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indict-

ment. *State v. Shaw*, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), subst. op., 880 So. 2d 296 (Miss. 2004).

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann. § 97-5-39(2), but was a lesser nonincluded offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the giving of the instruction but had requested it be given. *Moore v. State*, 799 So. 2d 89 (Miss. 2001).

Trial court properly granted defendant's request for lesser offense instruction on disorderly conduct, even though defendant had not been indicted for disorderly conduct and disorderly conduct was not a lesser included offense of simple assault; defendant argued that the most he could be guilty of was disorderly conduct, and he was entitled to have the jury instructed as to his theory of defense. *Williams v. State*, 797 So. 2d 372 (Miss. Ct. App. 2001).

### RESEARCH REFERENCES

**ALR.** Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 A.L.R.4th 118.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 A.L.R.4th 91.

## § 99-19-7. Verdict as to some, disagreement as to other defendants.

On the trial of two or more persons jointly indicted, the jury may render a verdict of guilty or not guilty as to some and disagree and be discharged as to others, without a verdict, if they cannot agree as to all; and the case of those as to whom a verdict was not found shall stand as if it had not been submitted to a jury, and shall be tried accordingly before another jury.

**SOURCES:** Codes, 1880, § 3079; 1892, § 1427; Laws, 1906, § 1500; Hemingway's 1917, § 1258; Laws, 1930, § 1281; Laws, 1942, § 2524.

**Cross References** — Verdicts and disagreements, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

### § 99-19-9. No special form of verdict required.

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

**SOURCES:** Codes, 1906, § 762; Hemingway's 1917, § 565; Laws, 1930, § 574; Laws, 1942, § 1518.

**Cross References** — Another section derived from same 1942 Code section, see § 11-7-157.

Verdict may be reformed at the bar if informal or defective, see § 99-19-11.

## JUDICIAL DECISIONS

### 1. In general.

It was not deficient performance on the defense counsel's part to fail to object to the form of the verdict because the verdict could be understood in a reasonably clear manner and, as such, would not be reversed just because it was a poor translation of the jury instructions. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

Verdict finding defendant guilty as "accessor to the crime" was too vague, uncertain and indefinite to support a conviction of grand larceny, where the evidence pointed strongly to another who actually took the money, since it could not be ascertained whether the jury meant, by

"accessor," that defendant was guilty as accessor before or after the larceny or that the defendant had received the money from another knowing it to have been stolen; and the defects of the verdict were not cured by statute pertaining to jeofails. *McDougal v. State*, 199 Miss. 39, 23 So. 2d 920 (1945).

Ordinarily, a verdict is sufficient in form if it expresses the intent of the jury so that the court can understand it. *Wilson v. State*, 197 Miss. 17, 19 So. 2d 475 (1944).

Verdict in criminal prosecution, "We the jury agree that the defendant is guilty as charged," is sufficient in form. *Wilson v. State*, 197 Miss. 17, 19 So. 2d 475 (1944).

## RESEARCH REFERENCES

**Am Jur.** 75A Am. Jur. 2d, Trial §§ 1789, 1790.

**CJS.** 89 C.J.S., Trial §§ 818-825 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 36:1, 36:2.

### § 99-19-11. Verdict may be reformed at the bar if informal or defective.

If the verdict is informal or defective the court may direct it to be reformed at the bar.

**SOURCES:** Codes, 1906, § 779; Hemingway's 1917, § 562; Laws, 1930, § 571; Laws, 1942, § 1515.

**Cross References** — Another section derived from same 1942 Code section, see § 11-7-159.

Defective verdicts, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

## JUDICIAL DECISIONS

**1. In general.**

Trial court did not err in failing to grant a mistrial after the jury returned two separate verdicts, as the judge redirected the jury's attention to the instruction emphasizing there could be only one verdict and instructed the jury to resume deliberations until a unanimous decision as to one form of the verdict was reached, and the jury returned five minutes later with a verdict finding defendant guilty of burglary of a dwelling *Clay v. State*, 881 So. 2d 323 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Where a jury trying a defendant had announced, in open court, that it had arrived at a verdict, which was handed to the clerk and as read found the defendant guilty as charged, whereupon one of the jurors mistakenly advised the court that the verdict was incorrect, and the word "not" was inserted in the verdict, but be-

fore the jury had adjourned, the court, being advised that amended verdict was wrong, ordered the jury back to the jury room for further deliberations, and defendant was again found guilty, the court did not err in overruling defendant's motion for a new trial where it was shown that defendant's rights were not prejudiced by the occurrence. *Anderson v. State*, 231 Miss. 352, 95 So. 2d 465 (1957).

Action of circuit court in permitting jury to reassemble and put its verdict in proper form before they had left courtroom or sight and presence of court was proper under this section [Code 1942, § 1515], where verdict was first returned, "We, jury, find the defendant guilty-charge," and was corrected to read, "We, the jury, find the defendant guilty as charged," and was signed by each member of jury. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

## RESEARCH REFERENCES

**ALR.** Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated. 14 A.L.R.5th 89.

Propriety of reassembling jury to amend, correct, clarify, or otherwise

change verdict after discharge or separation at conclusion of civil case. 19 A.L.R.5th 622.

**Am Jur.** 75B Am. Jur. 2d, Trial §§ 1886, 1889.

**CJS.** 89 C.J.S., Trial §§ 899, 900-906, 908-916.

**§ 99-19-12. Repealed.**

Repealed by Laws, 1998, ch. 358, § 5, eff from and after passage (approved March 16, 1998).

[Laws, 1997, ch. 454, § 7, eff from and after passage (approved March 25, 1997)]

**Editor's Note** — Former Section 99-19-12 provided for a pre-sentencing determination of a sexual offender's "sexual predator" status by the Sex Offender Advisory Board and actions taken thereon by the sentencing court.

**§ 99-19-13. Repealed.**

Repealed by Laws, 1974, ch. 576, § 9, eff from and after passage (approved April 23, 1974).

[Codes, 1880, § 3083; 1892, § 1439; 1906, § 1512; Hemingway's 1917, § 1270; 1930, § 1293; 1942, § 2536]



**Editor's Note** — Former § 99-19-13 was entitled: Sentence; capital cases.

## § 99-19-15. Sentence; felon under age sixteen.

When the court shall be satisfied that a person who has been found guilty of a felony not capital is not more than sixteen, the punishment imposed may, in the discretion of the court, be imprisonment in the county jail not exceeding one year, instead of imprisonment in the penitentiary.

**SOURCES:** Codes, 1880, § 3084; 1892, § 1440; Laws, 1906, § 1513; Hemingway's 1917, § 1271; Laws, 1930, § 1294; Laws, 1942, § 2537.

**Cross References** — Definition of "felony," see § 1-3-11.

Disposition Alternatives in delinquency cases, see § 43-21-605.

Office of Juvenile Correctional Institutions, see § 43-27-22.

Enforcement of sentence to county jail, see § 47-1-1.

Inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see Miss. R. Evid. 1101.

Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Under this section [Code 1942, § 2537] the trial judge has the discretion in a felony case against a defendant not over

sixteen years of age to imprison him in the county jail as much as one year instead of sending him to the penitentiary. *Kidd v. State*, 137 Miss. 419, 102 So. 68 (1924).

## RESEARCH REFERENCES

**ALR.** When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 942 et seq.

## § 99-19-17. Repealed.

Repealed by Laws, 2003, ch. 499, § 9, effective July 1, 2003.

[Codes, 1892, § 1441; Laws, 1906, § 1514; Hemingway's 1917, § 1272; Laws, 1930, § 1295; Laws, 1940, ch. 241; Laws, 1942, § 2538; Laws, 1970, ch. 346, § 1; Laws, 1993, ch. 359 § 4, eff from and after July 1, 1993.]

**Editor's Note** — Former § 99-19-17 was entitled: Sentence; when obtaining money under false pretenses and embezzlement may be punished as petit larceny.

**Cross References** — Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

## JUDICIAL DECISIONS

### 1. In general.

### 2. Instructions to jury.

### 1. In general.

Evidence was insufficient to support finding beyond reasonable doubt that

value of stolen property was in excess of \$100; therefore, defendant should have been sentenced for offense of petit larceny, where in affidavit sworn out in justice court, value of property was set at \$90, while at trial testimony regarding value of

stolen property was inconsistent. *Dulin v. State*, 507 So. 2d 897 (Miss. 1987).

Evidence that stolen postal money orders had been completed in an aggregate amount of \$200 and were negotiable was sufficient to justify a finding and sentence for a felony under this section [Code 1942, § 2538]. *Chavers v. State*, 215 So. 2d 880 (Miss. 1968).

An indictment charging embezzlement of gasoline credit cards is not void for failing to state the value of the cards, but where the value of the embezzled property is neither stated nor proved the offense is punishable as petit larceny and not as a felony. *Bell v. State*, 251 Miss. 511, 170 So. 2d 428 (1965).

Where defendant was punished under a statute providing generally for punishment upon conviction of receiving stolen goods and the indictment charged receipt of stolen property alleging the value of \$21, the defendant should have been sentenced under statute providing for punishment of such offense as petit larceny. *Jones v. State*, 215 Miss. 355, 60 So. 2d 805 (1952).

This section [Code 1942, § 2538] and Code 1942, § 2249 are inconsistent, and

since the legislature has seen fit to amend this section [Code 1942, § 2538] such section is controlling as the last pronouncement of the legislature. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

One convicted of receiving stolen property, consisting of an automobile tire of the value of less than \$25, cannot be sentenced to a term in the state penitentiary but can only be punished as for petit larceny. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

Under this section [Code 1942, § 2538] where the value is not shown to be above the limit stated therein, the defendant should be convicted of petit larceny only. *Wheeler v. State*, 76 Miss. 265, 24 So. 310 (1898).

## 2. Instructions to jury.

This section does not require that a defendant indicted for embezzlement of property valued at less than \$ 250 have the jury instructed with regard to petit larceny as a lesser included offense; this section affects only the sentence of a convicted defendant, not the crime for which he is charged or on which a jury is instructed. *Bishop v. State*, 755 So. 2d 1269 (Miss. Ct. App. 2000).

## RESEARCH REFERENCES

**ALR.** When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

## § 99-19-18. Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds.

When any person is convicted of a felony or felonies in which public funds in the amount of Ten Thousand Dollars (\$10,000.00) or more were unlawfully taken, obtained or misappropriated, the sentence imposed by the court shall include a minimum term of imprisonment of one (1) year in the custody of the Department of Corrections. Notwithstanding any other law to the contrary, such mandatory minimum term shall not be reduced or suspended nor shall such person be eligible for probation or parole before the expiration of one (1) year of incarceration.

**SOURCES:** Laws, 2002, ch. 309, § 1, eff from and after July 1, 2002.

**Cross References** — Unlawful conversion of public funds by officers, trustees and public employees, see § 97-11-25.

Embezzlement, generally, see §§ 97-23-19 et seq.

**§ 99-19-19. Repealed.**

Repealed by Laws, 1979, ch. 501, § 4, eff from and after April 18, 1979.

[Codes, Hutchinson's 1848, ch. 65, art. 2(56); 1857, ch. 64, art. 310; 1871, § 2811; 1880, § 3086; 1892, § 1443; 1906, § 1516; Hemingway's 1917, § 1274; 1930, § 1297; 1942, § 2540]

**Editor's Note** — Former § 99-19-19 was entitled: Sentence; convict committed until fine and costs paid.

**§ 99-19-20. Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.**

(1) When any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of said court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) The defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations hereinafter set out. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each Twenty-five Dollars (\$25.00) of the fine.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) Credit shall be earned for work performed under subsection (1)(d) above at the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

**SOURCES:** Laws, 1979, ch. 501, § 1; Laws, 1998, ch. 380, § 1, eff from and after passage (approved March 17, 1998).

**Cross References** — Utilization of a program of public service in the implementation of the provisions of this section, see § 21-23-7.

Imposition of fine on persons convicted of offenses punishable by more than 1 year of imprisonment, see § 99-19-32.

Fines, see Miss. Unif. Cir. & County Ct. Prac. R. 11.04.



## JUDICIAL DECISIONS

## I. UNDER CURRENT LAW.

1. In general.
- 2.-10. [Reserved for future use].

## II. UNDER FORMER LAW.

11. In general.

## I. UNDER CURRENT LAW.

## 1. In general.

Defendant's murder conviction was proper because his assertions that he was illegally detained were without merit; after he was convicted of three misdemeanor charges, he was unable to pay his fine and was rightfully detained in lieu of payment pursuant to Miss. Code Ann. § 99-19-20. *Bailey v. State*, 956 So. 2d 1016 (Miss. Ct. App. 2007).

Defendant asserted that pursuant to Miss. Code Ann. § 99-19-20, because he was indigent, he was wrongfully incarcerated for violating the terms of his probation. However, the record showed that if he was indigent, it was because he had recently been fired from his job for accruing more than \$ 5,000 in company credit card charges in violation of his employer's policy, and in fact, at the revocation hearing, he had testified that he did have income for restitution payments; thus, the trial judge did not abuse his discretion in determining that defendant was able to make restitution payments and that his probation should be revoked. *Baldwin v. State*, 891 So. 2d 274 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

The statute does not authorize a court to order that no good time or other credit be allowed on a sentence until arrangements are made for the payment of a fine and restitution. *Haynes v. State*, 811 So. 2d 283 (Miss. Ct. App. 2001).

When failure to pay court-imposed fines becomes a possible basis for a probation revocation, the trial court must follow the procedural mandates of subsection (2) of this section and *Berdin v. State* 648 So. 2d 73 (Miss. 1994).

A defendant was deprived of due process by a trial court's failure to conduct an inquiry as to the reason she was delin-

quent in paying her probation fines before revoking her probation because of her failure to pay those fines. *Berdin v. State*, 648 So. 2d 73 (Miss. 1994). But see *Smith v. State*, 742 So. 2d 1146 (Miss. 1999).

When a circuit court makes release from prison contingent upon payment of a fine, it is mandatory that the circuit court follow the statutory requirements of subsection (2) of this section; the court must make an inquiry as to whether the convicted defendant is in fact able to pay the fine, and make a finding on this question. As to the financial condition of an incarcerated prisoner years hence, the State is not without resources to collect a tax, a debt or a fine from a debtor who is not judgment proof. *Jones v. State*, 564 So. 2d 848 (Miss. 1990).

A defendant's equal protection challenge to his sentence of 14 years in the state penitentiary with 7 years suspended if he paid a \$125,000 fine was premature because there was nothing in the record showing the defendant to be indigent. *Arnett v. State*, 532 So. 2d 1003 (Miss. 1988).

If, after a defendant has completed his sentence, the Department of Corrections attempts to keep him incarcerated for failure to pay a fine, then the trial court must determine at that time whether he is financially able to pay the fine and, if not, must consider and apply one of the alternatives to imprisonment set out in this section. *Lee v. State*, 457 So. 2d 920 (Miss. 1984).

Under this section, a defendant could not be imprisoned for failure to pay a lawfully imposed fine, where he was financially unable to do so and the trial court so found; moreover, the trial court had no authority to alter defendant's \$45,000 fine; however, the court could require defendant to perform public service, or it could establish a realistic installment plan for the payment of the fine. *Cassibry v. State*, 453 So. 2d 1298 (Miss. 1984).

## 2.-10. [Reserved for future use].

## II. UNDER FORMER LAW.

## 11. In general.

The trial court did not err in committing

the defendant to jail for nonpayment of a fine, where, by the imposition of the fine of \$100, the defendant could never have been required to remain in jail longer than 90 days which was the statutory maximum period of confinement for the crime of which convicted. *McKinney v. State*, 260 So. 2d 444 (Miss. 1972).

A violation of the equal protection clause of the Fourteenth Amendment inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term, and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine, for the constitution prohibits the state from imposing a fine as a sentence and then converting it into a jail term because the defendant is unable to pay the fine in full forthwith. *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971), on remand, 471 S.W.2d 404 (Tex. Crim. App. 1971).

The imprisonment of an indigent, convicted of nine traffic offenses which were punishable by fines only, for inability to pay the fines totalling \$425, constituted an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971), on remand, 471 S.W.2d 404 (Tex. Crim. App. 1971).

Under the equal protection clause of the Fourteenth Amendment an indigent, convicted in a state court and sentenced to a maximum term of imprisonment specified by statute and payment of fine or court costs, and the judgment also directing, pursuant to statute, that if the defendant was in default of the monetary payment at the expiration of his imprisonment term he should remain in jail to "work off" the monetary obligation at the statutory rate of \$5 per day, may not be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence, either with regard to the fine or with regard to the costs (holding unconstitutional § 1-7(k) of the Illinois Criminal Code of 1961). *Williams v. Illinois*, 52 Ohio Op. 2d 281, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

A person convicted of murder and sentenced to life imprisonment is not liable for the costs. *State v. Burt*, 103 Miss. 755, 60 So. 773 (1913).

A case in which a sentence of \$500 and ninety days in jail provided that on payment of \$300 the fine and jail sentence be suspended on good behavior and that defendant stand committed until the remainder of the fine and costs are paid the defendant was not relieved of the imprisonment on failure to pay the fine. *Buck v. State*, 103 Miss. 276, 60 So. 321 (1913).

### ATTORNEY GENERAL OPINIONS

Court may condition probation on payment of fine, and may imprison defendant until fine is paid, if court finds that defendant is financially able to pay fine. *Nash*, Sept. 23, 1992, A.G. Op. #92-0736.

Subsection (2)(a) of this section puts limitation on time for which person can be imprisoned for contempt for refusing to pay fine when financially able to do so; although it puts limit on time of imprisonment, it does not create credit against fine for time served; for example, if person were fined \$100 and served 10 days for refusing to pay, although able to do so, then after 10 days prisoner would have to be released. *Stewart*, May 20, 1993, A.G. Op. #93-0255.

Credit may be earned while incarcer-

ated pursuant to this section for willful non-payment of fines; if defendant is sentenced to fine, defendant may also be allowed to work off fine minimum wage pursuant to subsections (1)(d) and (2)(c) of this section. *Stewart*, May 20, 1993, A.G. Op. #93-0255.

Section 19-3-41 empowers county board of supervisors to contract with private collection agency or attorney to collect outstanding fines and Section 99-19-20 does not forbid use of collection agency or attorney to collect delinquent fines. *Smith*, March 18, 1994, A.G. Op. #93-0863.

If a defendant fails to make payments on his fine as agreed, then a warrant may be issued to have the defendant brought

before the court to show cause why he should not be held in contempt. See Section 99-19-20. Spencer, August 2, 1996, A.G. Op. #96-0493.

This section sets forth sentencing alternatives which may be used by a justice court judge when considering how a defendant should be sentenced. The court may set up installment payments from a defendant if the judge determines a need for such action. There is no set amount of time that is standard for the payment of fines and the judge should use her discretion in determining such payments. Hatfield, August 16, 1996, A.G. Op. #96-0552.

Where a municipal court sentences a defendant to a work program, the defendant is entitled to be credited at the current federal minimum wage for any fine imposed; furthermore, an indigent defendant may be sentenced to a work program in lieu of a fine. Austin, Aug. 1, 1997, A.G. Op. #97-0472.

Where a defendant owes a \$250.00 fine but refuses to pay it, he can be sent to jail under this section; however, jail time un-

der this section is limited to 10 days (one day for each \$25.00 of the fine). If the defendant chooses to work during those 10 days, his fine will be reduced by \$10.00 a day under § 47-1-47 and, at the end of the 10 days, the defendant will have to be released, but will still owe \$150.00 in fines. Thornton, May 29, 1998, A.G. Op. #98-0306.

The statute provides for alternative sentencing in the event a defendant is unable to pay a fine, i.e. payment of fine over time, or is sentenced to a work program to work off the amount of the fine; however, there is no authority to add state assessments to a violation of a county ordinance. Glenn, May 19, 2000, A.G. Op. #2000-0215.

Miss. Code Section 99-19-20 provides that when person is sentenced to pay fine without imprisonment and ordered to perform work on public property for public benefit as payment of that fine, then credit shall be earned at federal minimum wage rate. Simmons, Jan. 11, 1993, A.G. Op. #92-0988.

## RESEARCH REFERENCES

**ALR.** Right to apply cash bail to payment of fine. 92 A.L.R.2d 1084.

Indigency of offender as affecting validity or imprisonment as alternative to payment of fine. 31 A.L.R.3d 926.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency. 113 A.L.R.5th 597.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

## § 99-19-21. Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended sentence.

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

(2) When a person is sentenced to imprisonment for a felony committed while the person was on parole, probation, earned-release supervision, post-



release supervision or suspended sentence, the imprisonment shall commence at the termination of the imprisonment for the preceding conviction. The term of imprisonment for a felony committed during parole, probation, earned-release supervision, post-release supervision or suspended sentence shall not run concurrently with any preceding term of imprisonment. If the person is not imprisoned in a penitentiary for the preceding conviction, he shall be placed immediately in the custody of the Department of Corrections to serve the term of imprisonment for the felony committed while on parole, probation, earned-release supervision, post-release supervision or suspended sentence.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8(11); 1857, ch. 64, art. 354; 1871, § 2861; 1880, § 3110; 1892, § 1459; Laws, 1906, § 1532; Hemingway's 1917, § 1294; Laws, 1930, § 1319; Laws, 1942, § 2567; Laws, 1942, ch. 301; Laws, 1983, ch. 333; Laws, 1995, ch. 596, § 14, eff from and after June 30, 1995.

**Cross References** — Probation and parole generally, see § 47-7-1 et seq. Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Felony while on parole.
3. Felony while on probation.

#### 1. In general.

In a drug case, two eight-year sentences imposed for drug charges were not ambiguous; the sentences imposed from the two indictments mirrored each other, and the trial court was allowed to order them to all run concurrently under Miss. Code Ann. § 99-19-21(1); defendant was eligible for release at the expiration of the longest term. *Heafner v. State*, 947 So. 2d 354 (Miss. Ct. App. 2007).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. *Mingo v. State*, 944 So. 2d 18 (Miss. 2006).

Inmate's non-mandatory sentences were given prior to his sentences as a habitual offender, and in order to comply with Miss. Code Ann. § 99-19-21, the inmate was required to finish serving his non-mandatory sentences before he could begin serving his mandatory sentences;

the Mississippi Department of Corrections had to be allowed to interpret its statutes in a manner that allowed the Mississippi Parole Board to impose an enhanced penalty for habitual offenders. *Snow v. Johnson*, 913 So. 2d 334 (Miss. Ct. App. 2005).

Trial court did not commit error when it imposed upon defendant a two-year sentence for escape under Miss. Code Ann. 97-9-49(1) where defendant was in jail awaiting trial for armed robbery when defendant escaped, force or violence was not required for the section to apply to an escape, as opposed to an "attempted escape", and it was within the discretion of the trial judge to impose consecutive sentences when defendant pled guilty to both crimes. *Smith v. State*, 868 So. 2d 1041 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion when it sentenced defendant; there was no basis for the appellate court to address defendant's request that she be granted a reduction of her state sentences or in the alternative a modification of her sentence to have it run concurrently with her five-year federal sentence. *Stewart v. State*, 845 So. 2d 744 (Miss. Ct. App. 2003).

Whether or not a sentence was to be served concurrently or consecutively was clearly within the discretion of the trial

judge according to Miss. Code Ann. § 99-19-21(1); as such, defendant was properly sentenced on his escape charge along with the aggravated assault and kidnapping sentences. *Coffey v. State*, 856 So. 2d 635 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

On convictions for kidnapping and rape pursuant to §§ 97-3-53 and 97-3-65, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

Consecutive sentences of 10 and 15 years imposed respectively for attempted rape and burglary of dwelling were permissible, even though both crimes arose out of same sequence of events and shared common element. *Armstead v. State*, 503 So. 2d 281 (Miss. 1987).

In sentencing defendant convicted of rape to term of imprisonment to run concurrently with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. *Harper v. State*, 463 So. 2d 1036 (Miss. 1985).

This section required that defendant's two separate sentences imposed for two separate convictions of burglary during two separate terms of the court be served consecutively. *Tate v. State*, 455 So. 2d 1312 (Miss. 1984).

Defendant, who was convicted separately of two burglaries during two separate terms of the Circuit Court, was required to serve his two sentences consecutively, under this section, where the second sentencing order did not ex-

pressly provide that the sentences run concurrently, and where, at the time of sentencing, this section provided that, in the absence of language affirmatively indicating that sentences run concurrently, a second term did not begin until the first had been completed. *Tate v. State*, 455 So. 2d 1312 (Miss. 1984).

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of § 97-3-7(1), and properly sentenced to three consecutive terms, pursuant to this section, for the three resulting convictions. *Ball v. State*, 437 So. 2d 423 (Miss. 1983).

Three life sentences imposed on a defendant convicted of murder, rape, and kidnapping, were to run concurrently where each of the three sentencing orders, all dated March 25th, 1968, imposed a life sentence "commencing from this date." *Watts v. Lucas*, 394 So. 2d 903 (Miss. 1981).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. *Woods v. State*, 393 So. 2d 1319 (Miss. 1981).

Defendant's sentences for four separate convictions were to run consecutively and not concurrently since none of the four judgments specified how they were to run. *Maycock v. Reed*, 328 So. 2d 349 (Miss. 1976).

This section [Code 1942, § 2567] requires that all sentences imposed by jus-

tices of the peace are to run consecutively rather than concurrently. *Pickett v. Thomas*, 209 So. 2d 192 (Miss. 1968).

## 2. Felony while on parole.

Where the defendant was being sentenced for a felony he committed while on probation, he was not eligible to be sentenced to concurrent terms. *Coleman v. State*, 772 So. 2d 1101 (Miss. Ct. App. 2000).

## 3. Felony while on probation.

Defendant properly received consecutive sentences after he was caught selling cocaine while he was on post-release su-

pervision for a conviction of a previous crime; when a convicted felon was sentenced for a crime he committed while he was on supervised release for committing a previous crime, the two sentences could not run concurrently, they had to run consecutively. *Judge v. State*, 933 So. 2d 1012 (Miss. Ct. App. 2006).

Inmate seeking post-conviction relief was not eligible to have his sentences run concurrently, because he committed the second offense while on probation. *Johnson v. State*, 909 So. 2d 1149 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**ALR.** Sentences by different courts as concurrent. 57 A.L.R.2d 1410.

Effect of invalidation of sentence upon separate sentence which runs consecutively. 68 A.L.R.2d 712.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

Propriety of imposing consecutive sen-

tences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm. 55 A.L.R. Fed. 633.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 895 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2181 et seq.

## § 99-19-23. Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

**SOURCES:** Codes, 1942, § 2540.5; Laws, 1968, ch. 382, § 1, eff from and after passage (approved April 11, 1968).

**Cross References** — Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Trial court correctly concluded that the inmate was not entitled to credit for time served while incarcerated in Alabama as punishment for a crime committed in that state, even though there were criminal charges pending against him in Mississippi during the entire period of his Ala-

bama confinement; a prisoner actually serving time for another conviction was not, within the meaning of Miss. Code Ann. § 99-19-23. *Stanley v. State*, 850 So. 2d 154 (Miss. Ct. App. 2003).

Although the supreme court reversed the armed robbery judgment, the mandate was not issued and recorded until



April 10, 1998, so the trial court, in sentencing the defendant on the manslaughter charge, did not abuse its discretion in beginning the calculation of credit for time served on that date. *Skinner v. State*, 790 So. 2d 218 (Miss. Ct. App. 2001).

The defendant was not entitled to approximately 105 days credit on his Mississippi conviction for the time served while awaiting extradition to Mississippi for unrelated charges, notwithstanding that those unrelated charges were ultimately dropped prior to his extradition to Mississippi. *Taylor v. State*, 726 So. 2d 227 (Miss. Ct. App. 1998).

A defendant who was sentenced to 10 years imprisonment for armed robbery and 15 years imprisonment for manslaughter to run consecutively, would be eligible for parole on March 30, 1993, where he began the service of his 10-year armed robbery sentence on the date of his initial arrest pursuant to this section, he was legally released from that sentence 10 years later on February 5, 1990 but remained held under the 15-year manslaughter sentence, and he earned substantial meritorious earned time; although he would ordinarily have been

required to serve at least  $\frac{1}{4}$  of the manslaughter sentence—3 years and 9 months—before he became eligible for parole, his earned time advanced his earliest parole eligibility date by approximately 7 months. *Milam v. State*, 578 So. 2d 272 (Miss. 1991).

Under this section, a circuit judge of one county may grant credit for time served in a second county, where a prisoner is arrested and charged with a crime in the first county and, prior to arraignment, is subsequently transferred to the second county to face another charge, and where the transfer is attended by a detainer from the first county. *Lee v. State*, 437 So. 2d 1208 (Miss. 1983).

This section has no application to time served in another state while an accused is awaiting return to Mississippi to face criminal charges, where to hold otherwise would encourage an accused to flee the State and seek refuge in another state or locality of his own choosing and fight extradition knowing that any time spent in jail in such state would be credited to any sentence received by him upon conviction. *Holland v. State*, 418 So. 2d 73 (Miss. 1982).

## RESEARCH REFERENCES

**ALR.** Right of state or Federal prisoner to credit for time served in another jurisdiction before delivery to state or Federal authorities. 18 A.L.R.2d 511.

Right to credit for time served under erroneous or void sentence or invalid judgment for conviction necessitating new trial. 35 A.L.R.2d 1283.

Right to credit for time spent in custody prior to trial or sentence. 77 A.L.R.3d 182.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where court fails to specify in that regard. 90 A.L.R.3d 408.

Defendant's right to credit for time spent in halfway house, rehabilitation

center, or similar restrictive environment as a condition of pretrial release. 29 A.L.R.4th 240.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 A.L.R.4th 192.

When is federal prisoner entitled, under 18 USCS § 3568, to credit for time spent in state custody "in connection with" offense or acts for which federal sentence was imposed. 47 A.L.R. Fed. 755.

**Law Reviews.** 1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Presentence Credit. 53 Miss. L. J. 159, March, 1983.

## § 99-19-25. Sentence; circuit and county judges and justice courts may suspend in misdemeanor cases.

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence,

or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years.

The justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under Sections 49-7-81, 49-7-95 and the Implied Consent Law shall not suspend any fine.

**SOURCES:** Codes, Hemingway's 1917, § 1275; Laws, 1930, § 1298; Laws, 1942, § 2541; Laws, 1914, ch. 207; Laws, 1950, ch. 347; Laws, 1964, ch. 358; Laws, 1973, ch. 470, § 1; Laws, 1981, ch. 491, § 14; Laws, 1995, ch. 551, § 4, eff from and after July 1, 1995.

**Editor's Note** — Laws of 1981, ch. 491, § 15, provides as follows:

"SECTION 15. Prosecutions, convictions and penalties for violations which occurred prior to the effective date of this act under laws amended or repealed by this act, or suspensions or denials of driver's licenses or permits made pursuant to laws amended or repealed by this act, shall not be affected or abated by the provisions of this act."

**Cross References** — Placing offender on earned probation program, see § 47-7-47.

Fines and other penalties under the Implied Consent Law, see § 63-11-30.

Compromise of petit misdemeanors where injured party has been satisfied, see § 99-15-51.

Prohibition against justices of the peace suspending sentence in intoxicating liquors prosecution, see § 99-27-43.

Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

## JUDICIAL DECISIONS

1. Generally.
2. Revocation of suspension.

### 1. Generally.

Even though a misdemeanor is punishable by a confinement period of one year or less under Uniform Circuit and County Court Rule 6.01, a longer probationary period covering a misdemeanor with a suspended sentence can be inferred from this section. *Conner v. State*, 750 So. 2d 1258 (Miss. 2000).

This section [Code 1942, § 2541] is not unconstitutional as an intrusion upon the pardoning power of the governor. *Gabriel v. Brame*, 200 Miss. 767, 28 So. 2d 581 (1947).

This provision does not authorize the deferment of the imposition of a sentence. *White v. State*, 185 Miss. 307, 188 So. 8 (1939).

Appeal more than six months after conviction for disturbing peace of family held

barred, though portion of sentence was suspended. *Dickerson v. State*, 150 Miss. 823, 117 So. 261 (1928).

### 2. Revocation of suspension.

Power to revoke the suspension of a sentence for a misdemeanor is limited to a reasonable time; and revocation of a suspended 90-day sentence after five years is not within a reasonable time. *Jackson v. Waller*, 248 Miss. 172, 160 So. 2d 184 (1964).

A suspension of sentence whether for a felony or a misdemeanor may not be revoked after five years. *Jackson v. Waller*, 248 Miss. 172, 160 So. 2d 184 (1964).

Where the jail sentence of accused, who had been convicted of two separate charges of trespass and one of assault and battery was suspended during good behavior, an appeal would not lie from the trial judge's action revoking the suspen-

sion and committing the accused to jail following a finding, upon ample evidence, that accused had assaulted, without justification, another person; neither was the accused entitled to relief by invoking habeas corpus. *Blount v. State*, 229 Miss. 211, 90 So. 2d 373 (1956).

Where defendant had waited for about 18 months before moving to withdraw plea of guilty and until after district attorney had moved to revoke suspension of sentence for violation of terms of suspension, there was a lack of diligence on the

part of the defendant, and overruling of the motion for withdrawal of pleading of guilty was not abuse of discretion. *Perciful v. Holley*, 217 Miss. 203, 63 So. 2d 817 (1953).

Violation of condition of suspended sentence, as basis for annulment and revocation of suspended sentence, need not be established beyond reasonable doubt, but only by evidence convincing court that condition was violated. *McLemore v. State*, 170 Miss. 641, 155 So. 415 (1934).

### ATTORNEY GENERAL OPINIONS

A justice court judge may not suspend the fine for a violation of the Implied Consent Law. Little, June 4, 1999, A.G. Op. #99-0265.

A justice court judge may not suspend the minimum monetary fine imposed for a head lighting deer violation; however, a circuit or county court judge may suspend such fine if the charge is brought in circuit or county court. Moffett, Sept. 27, 2002, A.G. Op. #02-0567.

This section permits a justice court judge to place conditions on the suspension of a sentence where the sentence has no jail time, i.e., only a fine, upon the conviction of a defendant of a misdemeanor. Adams, Aug. 1, 2003, A.G. Op. 03-0368.

This section allows a justice court to establish a probationary period of up to two years after suspension of a sentence. Adams, Aug. 1, 2003, A.G. Op. 03-0368.

This section allows a justice court to suspend sentences on such conditions as it deems advisable. Those conditions may include house arrest and/or probation services administered by private companies. If a defendant fails to comply with the conditions imposed by the justice court, the justice court may revoke the suspended sentence and enforce the original sentence. Young, July 7, 2004, A.G. Op. 04-0287.

### RESEARCH REFERENCES

**ALR.** Propriety and effect of court's indication to jury that court would suspend sentence. 8 A.L.R.2d 1001.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 895 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2145, 2147.

## § 99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.

Every convicted offender of a criminal law who receives a parole or suspended sentence for a definite time, and fails to surrender himself to the proper authority for execution of sentence on expiration of such parole or



suspended sentence, shall be regarded and treated as an escaped convict and subject as such to arrest and return to the proper authorities by any officer or citizen who could have made such arrest had such offender been an ordinary escaped prisoner, and shall be promptly returned to the proper authorities for execution of sentence.

**SOURCES:** Codes, 1930, § 1299; Laws, 1942, § 2542; Laws, 1926, ch. 147.

**Cross References** — Probation and parole generally, see §§ 47-7-1 et seq.

Escape of prisoners generally, see § 97-9-43.

Criminal arrests generally, see Chapter 3 of this title.

Sentencing, see Miss. Unif. Cir. & County Ct. Prac. R. 11.01 et seq.

### RESEARCH REFERENCES

**ALR.** Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 A.L.R.2d 1074.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 895 et seq.

59 Am. Jur. 2d, Pardon and Parole §§ 129, 130, 132, 135, 149.

**CJS.** 24 C.J.S., Criminal Law §§ 2159, 2160.

67 C.J.S., Pardon and Parole § 22.

## § 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

**SOURCES:** Codes, 1930, § 1300; Laws, 1942, § 2543; Laws, 1926, ch. 147.

**Cross References** — Governor's power to pardon, see Miss. Const. Art. 5, § 124.

Probation and parole generally, see §§ 47-7-1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Notice and hearing.
3. Evidence.
4. Appeals.

**1. In general.**

Where appellant was convicted of two counts of selling a controlled substance, his sentence was suspended during five years of probation, and appellant's probation was later revoked when he was convicted of selling marijuana; appellant was not entitled to appointed counsel during the probation revocation hearing; he presented no evidence that the probation revocation required counsel or that the court denied his request for counsel. *Sanders v. State*, 942 So. 2d 298 (Miss. Ct. App. 2006).

This section [Code 1942, § 2543] is effectual to regulate the right of any court, which has the power to impose sentences upon anyone convicted of crime, to suspend a sentence and therefore to revoke such suspension upon proper showing that the suspension should be revoked. *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954).

There is no limitation or restriction contained in the constitution that would preclude the governor from granting suspended sentences on conditions that may be both advisable and expedient in his opinion as to the proper exercise of executive clemency. *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954).

A former suspended sentence may under this section [Code 1942, § 2543] be revoked in vacation, but there is no authority to impose a sentence except in term time. *White v. State*, 214 Miss. 235, 58 So. 2d 510 (1952).

Under this section [Code 1942, § 2543] which provides that whenever an offender has violated the condition of a suspended sentence the court is authorized to annul such suspended sentence and the offender shall be subject to arrest and court sentence service, as if no suspended sentence has been granted and for the full term of the original sentence that had not been served, the court may enforce the judgment and revoke the suspension of execution at any subsequent time, even after

the original period of the sentence has passed. *Smith v. State*, 212 Miss. 497, 54 So. 2d 739 (1951).

This section [Code 1942, § 2543] is not unconstitutional as an intrusion upon the pardoning power of the governor. *Gabriel v. Brame*, 200 Miss. 767, 28 So. 2d 581 (1947).

No authority is found in this section [Code 1942, § 2543] for a circuit judge in vacation to impose a sentence for a misdemeanor. *White v. State*, 185 Miss. 307, 188 So. 8 (1939).

**2. Notice and hearing.**

Where governor in granting an indefinite suspension of sentence imposed the condition that it may be revoked without notice for any reason deemed sufficient to the governor and he may not have been willing to grant the suspension otherwise and prisoner agreed by accepting the order of suspension, the prisoner waived right to notice and hearing upon a question of revocation of suspension of sentence without notice and hearing. *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954).

While this section [Code 1942, § 2543] does not so specifically require, one whose suspended sentence is subject to revocation is entitled to notice and the opportunity to be heard at public hearing before revocation of such suspended sentence. *Mason v. Cochran*, 209 Miss. 163, 46 So. 2d 106 (1950).

Revocation of a suspended sentence without notice and an opportunity to be heard at public hearing to defendant violates the requirements of due process, even though the statute providing for such revocation does not specifically provide for notice and public hearing. *Mason v. Cochran*, 209 Miss. 163, 46 So. 2d 106 (1950).

Although judgments of convictions of law violations rendered subsequent to the suspension of a sentence, and which are unappealed from, constitute a sufficient showing that the conditions of the suspension had been violated, even in such case defendant is entitled to an opportunity to be heard as to whether the affidavits or indictments alleged any crime known to the law, and as to whether he had in truth and in fact been guilty of any misbehavior after first showing, if he could, that the

judgments of conviction are void. *Mason v. Cochran*, 209 Miss. 163, 46 So. 2d 106 (1950).

### 3. Evidence.

A hearing upon a petition for revocation of a suspension of sentence is not in the nature of a criminal trial and it is not incumbent upon the state to show beyond a reasonable doubt the defendant has violated the conditions of the suspension order and it is only necessary that the evidence be sufficient to convince the court that the conditions of the suspension have been violated. *Murphy v. Lawhon*, 213 Miss. 513, 57 So. 2d 154 (1952).

The court did not abuse its discretion in permitting the district attorney to conduct a thorough cross examination of the defendant, who was testifying voluntarily as a witness in his own behalf, for the purpose of testing the truthfulness of his statements and for the purpose of determining whether he had been guilty of such misconduct as would justify the revocation of the suspension. *Murphy v. Lawhon*, 213 Miss. 513, 57 So. 2d 154 (1952).

The violation of the conditions for suspension of sentence for unlawful possession of intoxicating liquor, need not be established beyond a reasonable doubt but only by evidence convincing the court of such violation. *Shook v. State*, 212 Miss. 472, 54 So. 2d 728 (1951).

Where the record in proceedings for the revocation of suspension of sentence,

shows that the appellant was given due notice and an opportunity to be heard and was accorded a public hearing, the orders of revocation were valid. *Shook v. State*, 212 Miss. 472, 54 So. 2d 728 (1951).

Violation of condition of suspended sentence, as basis for annulment and revocation of suspended sentence, need not be established beyond reasonable doubt, but only by evidence convincing court that condition was violated. *McLemore v. State*, 170 Miss. 641, 155 So. 415 (1934).

### 4. Appeals.

Order revoking suspension of sentence of accused who had pleaded guilty of unlawful possession of intoxicating liquors held not appealable. *Cooper v. State*, 175 Miss. 718, 168 So. 53 (1936). But see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Where hearing with respect to revocation of suspended sentence is public and on reasonable notice and evidence is sufficient to convince reasonable person that conditions of suspension have been broken, convict has no recourse when judge revokes suspension except to serve sentence and pay fine in so far as theretofore suspended, and in any event convict has no recourse by appeal. *Cooper v. State*, 175 Miss. 718, 168 So. 53 (1936). But see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

## RESEARCH REFERENCES

**ALR.** Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 A.L.R.2d 1074.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Admissibility of hearsay evidence in

probation revocation hearings. 11 A.L.R.4th 999.

Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 895 et seq.

59 Am. Jur. 2d, Pardon and Parole §§ 129, 130, 132, 135, 149.

**CJS.** 24 C.J.S., Criminal Law §§ 2159, 2160.

67 C.J.S., Pardon and Parole § 22.

## § 99-19-31. Penalty where none fixed elsewhere by statute.

Offenses for which a penalty is not provided elsewhere by statute, and



offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than one thousand dollars (\$1,000.00) and imprisonment in the county jail not more than six (6) months, or either.

**SOURCES:** Codes, 1957, ch. 64, art. 356; 1871, § 2863; 1880, § 3098; 1892, § 1454; Laws, 1906, § 1527; Hemingway's 1917, § 1289; Laws, 1930, § 1314; Laws, 1942, § 2562; Laws, 1984, ch. 353, § 3, eff from and after July 1, 1984.

**Cross References** — Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

## JUDICIAL DECISIONS

### 1. In general.

This section [Code 1942, § 2562] does not apply to the chancery court's power to punish for violation of an injunction prohibiting gambling operations and abating gambling establishment as nuisance but the defendant could be punished under Code 1942, § 1278, which gives the chancery court power to punish for violation of an injunction. *Alexander v. State*, 210 Miss. 517, 49 So. 2d 890 (1951).

Since the power exercised by the lower court in the prosecution and sentence for constructive contempt was derived from the inherent powers of the court, this section [Code 1942, § 2562] was without application. *Melvin v. State*, 210 Miss. 132, 48 So. 2d 856 (1950), error overruled 210 Miss. 132, 49 So. 2d 837.

Code 1942, § 2613, subd (b) authorizing the imposition of a minimum fine for un-

lawful possession of intoxicating liquors but fixing no maximum fine, is incomplete and is supplemented by this section [Code 1942, § 2562], fixing a maximum fine of \$500 for misdemeanors where no other statutes prescribe a penalty. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

A charge under this section [Code 1942, § 2562] of assault and battery with fists cannot be consolidated with a charge of exhibiting a deadly weapon in a rude, angry and threatening manner (Code 1942, § 2086) and a charge of carrying concealed a deadly weapon (Code 1942, § 2079), and one trial had of the consolidated case. *Woods v. State*, 200 Miss. 527, 27 So. 2d 895 (1946).

A case within this provision where the punishment was excessive affirmed and the punishment ordered reduced. *Keel v. State*, 133 Miss. 160, 97 So. 521 (1923).

## RESEARCH REFERENCES

**ALR.** Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

## § 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.

(1) Offenses punishable by imprisonment in the State Penitentiary for more than one (1) year and for which no fine is provided elsewhere by statute may be punishable by a fine not in excess of Ten Thousand Dollars

(\$10,000.00). Such fine, if imposed, may be in addition to imprisonment or any other punishment or penalty authorized by law.

(2) Such assessments as are collected under subsection (5) of Section 99-19-73 shall be deposited in a special fund hereby created in the State Treasury to be designated the "Criminal Justice Fund." The Legislature may make appropriations from the Criminal Justice Fund for the purpose of defraying such costs as the state incurs in the administration of the criminal justice system of this state.

**SOURCES:** Laws, 1985, ch. 495, § 1; Laws, 1990, ch. 329, § 14, eff from and after October 1, 1990.

**Cross References** — Duty of state officials to pay in collections, see § 7-9-21.

Deposit into the criminal justice fund of an additional fine imposed on a person convicted of issuing a bad check when the prosecution was commenced by the filing of a complaint by the district attorney after the accused failed to make restitution, see § 97-19-67.

Deposit of funds received as restitution for a bad check into the criminal justice fund when the complainant cannot be located, see § 97-19-77.

Imposition of fine, imprisonment for nonpayment, and application to indigent defendants, see § 99-19-20.

Collection of fines and duties of collecting officers, see §§ 99-19-65 et seq.

Deposit of portion of standard state assessment into the Criminal Justice Fund, see § 99-19-73.

Deposit of funds from escrow account established pursuant to Crime Victim's Escrow Account Act into Criminal Justice Fund, see § 99-38-9.

## JUDICIAL DECISIONS

1. In general.
2. Ability to pay.

### 1. In general.

Where a defendant is convicted of manslaughter under Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 99-19-32(1), and the sentence imposed is a term of imprisonment in the penitentiary, the fine provision of Miss. Code Ann. § 97-3-25 is not applicable. However, where the offense is punishable by imprisonment in the penitentiary for more than one year and the imposition of a fine is not provided elsewhere, Miss. Code Ann. § 99-19-32(1) is applicable and allows for imposition of a fine not in excess of \$ 10,000. *Felder v. State*, 876 So. 2d 372 (Miss. 2004).

In viewing Miss. Code Ann. §§ 97-3-25, 99-19-32(1), and § 47-7-49 in *pari materia*, the trial court was within its discretion to order defendant, convicted of manslaughter and sentenced to a term of imprisonment, to pay not only a \$10,000 fine, but also a \$ 10,000 assessment to the

Mississippi Crime Victims' Compensation Fund. *Felder v. State*, 876 So. 2d 372 (Miss. 2004).

As a trial judge clearly had authority via Miss. Code Ann. § 99-19-32 to impose a fine in addition to the penitentiary sentence imposed under the felony portion of the embezzlement statute, former Miss. Code Ann. § 97-23-19 (which provided for a fine only when being sentenced as a misdemeanor), the trial judge properly rejected the inmate's argument that upon payment of the fine he had completed his misdemeanor sentence and was entitled to release from the prison sentence. *Gulley v. State*, 870 So. 2d 652 (Miss. 2004).

### 2. Ability to pay.

In was not error for the trial court to impose a \$10,000 fine, court-appointed attorney fees, and costs on the defendant in a murder prosecution without first inquiring into the defendant's ability to pay.

Conley v. State, 790 So. 2d 773 (Miss. 2001).

## RESEARCH REFERENCES

**ALR.** Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 A.L.R.3d 926.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees paid by litigants. 72 A.L.R.3d 375.

Substitution of judge in state criminal trial. 45 A.L.R.5th 591.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 1197 et seq.

## § 99-19-33. Where penalty modified milder penalty may be imposed.

If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court but no conviction, otherwise valid, shall be set aside and new trial granted merely because of an error of the court in fixing punishment. Such error shall only entitle the party injured to vacate or reverse the judgment as to the punishment, and the legal punishment shall then be imposed by another sentence based on the original conviction or plea of guilty.

**SOURCES:** Codes, 1906, § 1574; Hemingway's 1917, § 1336; Laws, 1942, § 2609; Laws, 1930, § 1362.

## JUDICIAL DECISIONS

### 1. In general.

Sentence of 36 years for rape of a child under the age of 14 following remand from the appellate court for resentencing on defendant's original 50-year sentence after an amendment to Miss. Code Ann. § 97-3-65 reduced the maximum sentence from death or life imprisonment to 20 years to life was proper; defendant's argument that the sentence was the equivalent of life and was therefore not a lesser punishment within the meaning of Miss. Code Ann. § 99-19-33 was without merit. *Johnson v. State*, 824 So. 2d 638 (Miss. Ct. App. 2002).

When a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended. *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999).

This section gives the trial judge the right to sentence one convicted of crime after the law has been changed so as to permit a milder sentence before the conviction has become final, but does not apply where the statute providing for a milder sentence is passed after the conviction has become final. *Davis v. State*, 308 So. 2d 87 (Miss. 1975).

Where the trial court has imposed a sentence other than that prescribed by law, the defendant may be brought before the court upon an alias capias for imposition of the proper sentence. *Smithey v. State*, 93 Miss. 257, 46 So. 410 (1908).

The failure of the trial court to impose a proper sentence does not deprive the defendant in another prosecution of the right to plead former jeopardy. *Smithey v. State*, 93 Miss. 257, 46 So. 410 (1908).



## § 99-19-35. Person convicted of certain crimes not to practice medicine or dentistry, or hold office.

A person convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, shall not be allowed to practice medicine or dentistry, or be appointed to hold or perform the duties of any office of profit, trust, or honor, unless after full pardon for the same.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 2(63); 1857, ch. 64, art. 358; 1871, § 2865; 1880, § 3100; 1892, § 1455; Laws, 1906, § 1528; Hemingway's 1917, § 1290; Laws, 1930, § 1315; Laws, 1942, § 2563; Laws, 1987, ch. 499, § 18, *eff from and after July 24, 1987 (the date on which the United States Attorney General interposed no objection to the amendment)*.

**Editor's Note** — Laws of 1987, ch. 499, §§ 20 through 22, provide as follows:

"SECTION 20. If any section, paragraph, sentence, clause or phrase of this act is declared to be unconstitutional or void, or for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses or phrases shall be in no manner affected thereby but shall remain in full force and effect.

"SECTION 21. The Attorney General of the State of Mississippi is hereby directed to submit this act immediately upon its approval by the Legislature to the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 22. This act shall take effect and be in force from and after the date it is effectuated under the provisions of Section 5 of the Voting Rights Act of 1965, as amended and extended."

The United States Attorney General interposed no objection on July 24, 1987, to the amendment proposed by § 18, ch. 499, Laws of 1987.

## JUDICIAL DECISIONS

### 1. In general.

Request to be sentenced pursuant to Miss. Code Ann. § 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request; in defendant's case, the circuit court accepted defendant's guilty plea and adjudicated defendant accordingly. Thus, the circuit court did not err in denying defendant's petition for expungement, and in any event, defendant, convicted of burglary, could not hold any office until defendant was pardoned

for that crime. *Turner v. State*, 876 So. 2d 1056 (Miss. Ct. App. 2004).

Physician was not entitled to reinstatement of a medical license after completing sentence imposed for federal money laundering conviction; statute bars doctor convicted of felony involving moral turpitude from practicing profession and physician's reputation for truth and veracity were not good. *Montalvo v. Mississippi State Bd. of Medical Licensure*, 671 So. 2d 53 (Miss. 1996).

## ATTORNEY GENERAL OPINIONS

Mississippi Supreme Court has interpreted similar provisions in Mississippi Constitution to apply only to convictions of such crimes in courts of Mississippi and

not to convictions of crimes in federal court or in another state; person convicted of crime in United States District Court would not fall within scope of § 99-19-35.

Harris, August 29, 1990, A.G. Op. #90-0657.

### RESEARCH REFERENCES

**ALR.** Infamous crime or one involving moral turpitude constituting disqualification to hold public office. 52 A.L.R.2d 1314.

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 A.L.R.3d 303.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 1311 et seq.

25 Am. Jur. 2d, Elections §§ 173 et seq.

63 Am. Jur. 2d, Public Officers and Employees §§ 71 et seq.

## § 99-19-37. Restoration of right of suffrage to World War veterans.

(1) Any person who has lost the right of suffrage by reason of conviction of crime and has not been pardoned therefrom, who thereafter served honorably in any branch of the armed forces of the United States during the periods of World War I or World War II as hereinafter defined and shall have received an honorable discharge, or release therefrom, shall by reason of such honorable service, have the full right of suffrage restored, provided, however, this does not apply to any one having an unfinished or suspended sentence.

(2) For the purposes of this section the period of World War I shall be from April 6, 1917 to December 1, 1918, and the period of World War II shall be from December 7, 1941 to December 31, 1946.

(3) In order to have restored, and to exercise, the right of franchise under the provisions of this section a person affected hereby shall have his discharge, or release, from the armed forces of the United States recorded in the office of the chancery clerk of the county in which such person desires to exercise the right of franchise and if such discharge, or release, appears to be an honorable discharge, or release, and shows such person to have served honorably during either of the periods stated in subsection (2) of this section such person shall have the full right of suffrage restored as though an act had been passed by the legislature in accordance with Section 253 of the Constitution of the State of Mississippi restoring the right of suffrage to such person.

**SOURCES:** Codes, 1942, § 2563.5; Laws, 1948, ch. 505, §§ 1-3.

**Cross References** — Restoration of right of suffrage after crime, see Miss. Const. Art. 12, § 253.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

### RESEARCH REFERENCES

**ALR.** Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

## § 99-19-39. Detention of convict pending appeal.

If the defendant appeal from the conviction and be not removed on appeal, as provided in the next succeeding section, he shall be detained, according to the judgment of the circuit court, until the supreme court shall have decided his case, and the judgment thereof shall have been certified to the circuit court and the same fully executed.

**SOURCES:** Codes, 1857, ch. 64, art. 312; 1871, § 2813; 1880, § 3087; 1892, § 1444; Laws, 1906, § 1517; Hemingway's 1917, § 1276; Laws, 1930, § 1301; Laws, 1942, § 2544.

**Cross References** — Confinement of male prisoners sentenced to death, see § 99-19-55.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.

## JUDICIAL DECISIONS

### 1. In general.

An appeal to the Supreme Court of the United States effectively stayed the execution of prisoner's sentence to life imprisonment in the state penitentiary, and pending the disposition of that appeal, punishment of the prisoner by a confinement in the state penitentiary could not be exacted, and the prisoner was entitled

to be incarcerated in the jail of the county where he was convicted and sentenced, subject to the power of the circuit judge of the county to order his removal to some other jail for safekeeping. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

## § 99-19-41. Delivery of appellant to county where supreme court is held.

When any person shall be convicted of an offense and an appeal shall be taken to the supreme court, the sheriff shall, on an order for that purpose from the judge of the court where he was tried, or a judge of the supreme court, deliver such convict to the sheriff of the county where the supreme court is held, at the term thereof to which the appeal shall be made returnable, who shall safely keep such prisoner, subject to the order of the supreme court.

**SOURCES:** Codes, 1857, ch. 64, art. 314; 1871, § 2815; 1880, § 3088; 1892, § 1445; Laws, 1906, § 1518; Hemingway's 1917, § 1277; Laws, 1930, § 1302; Laws, 1942, § 2545.

**Cross References** — Duties of Sheriffs generally, see § 19-25-67.

Detention of convict pending appeal, see § 99-19-39.

Duty of sheriff of Hinds County to receive and safely keep, according to supreme court order, all persons ordered into his custody, see § 99-35-127.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.



## JUDICIAL DECISIONS

### 1. In general.

Action by convicted murderer sentenced to life imprisonment to be returned from state penitentiary to county detention center during pendency of his appeal, as mandated by this section, is subject to one

year statute of limitations, where inmate brought this action under 42 USCS § 1983. *Fairley v. Allain*, 817 F.2d 306 (5th Cir. 1987), reh'g granted, 820 F.2d 728 (5th Cir. 1987).

### § 99-19-42. Post-conviction proceeding; time for hearing and return to Department of Corrections.

Any offender in the custody of the Department of Corrections who is summoned to a county by court order for any post-conviction proceeding shall have such proceeding heard during the term of court in which the offender is returned to the custody of a county. If the offender's case is not heard during such term of court, the offender shall be returned to the facility of the Department of Corrections from which he was summoned. If the offender is not returned within one (1) week of the end of the term of court, the county housing the offender shall not receive the Twenty Dollars (\$20.00) allowed under Section 47-5-901 for housing state offenders after the one-week time required for returning the offender to the Department of Corrections.

**SOURCES:** Laws, 1995, ch. 566, § 1, eff from and after July 1, 1995.

**Cross References** — State offenders serving sentences in county jails generally, see §§ 47-5-901 through 47-5-911.

Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

## RESEARCH REFERENCES

CJS. 24 C.J.S., Criminal Law § 2223.

### § 99-19-43. Duty of judge when convict sentenced to penitentiary.

It shall be the duty of the judge, when any convict is sentenced to imprisonment in the penitentiary, to commit the convict to the nearest jail which may be deemed safe, and by the next mail after the sentence to give notice to the warden of the penitentiary that such convict is confined, subject to his order, in a certain county jail, and to inform him whether, in his opinion, he is a dangerous criminal, and whether more than ordinary precautions will be necessary in guarding him.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 17(82); 1857, ch. 64, art. 321; 1871, § 2852; 1880, § 3089; 1892, § 1446; Laws, 1906, § 1519; Hemingway's 1917, § 1278; Laws, 1930, § 1303; Laws, 1942, § 2546.

**Cross References** — Transportation of prisoners from place of confinement to penitentiary, see § 47-5-111.

Placing of offender on earned probation program, see § 47-7-47.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.

## § 99-19-45. Commitment to penitentiary; duties of clerks of circuit court; fees.

The clerks of the circuit court of the counties in the State of Mississippi shall furnish the Mississippi Department of Corrections, within five (5) days after adjournment of court, a commitment paper showing the name, sex, race and social security number of the person convicted and the crime committed, along with certified copies of the sentencing order and indictment, as well as any subsequent order entered by the court in such cause.

The clerks shall also furnish the Department of Corrections, within five (5) days after adjournment of such court, a certified copy of the probation order of an individual who is placed on probation under the supervision of the Division of Community Corrections of the department. Such order shall provide the name of the person placed on probation, the crime, term of sentence, date of sentence, period of probation, sex, race and a brief history of the crime committed.

As compensation for such services they shall receive the sum of Fifty Cents (50¢) for each transcript, and the sum shall be paid out of the treasury of the county, with the approval of the board of supervisors, on the filing of a bill for such service.

**SOURCES:** Codes, Hemingway's 1917, §§ 1279, 1280; Laws, 1930, §§ 1304, 1305; Laws, 1942, §§ 2547, 2548; Laws, 1912, ch. 147; Laws, 1991, ch. 379 § 1; Laws, 2002, ch. 624, § 10; Laws, 2006, ch. 455, § 1, eff from and after July 1, 2006.

**Amendment Notes** — The 2006 amendment rewrote the first paragraph to require that certain documents and information be included in commitment papers.

**Cross References** — Clerks of the circuit courts generally, see §§ 9-7-121 through 9-7-141.

Form to be used in transmitting — required data upon commitment of persons convicted of crimes to penitentiary, see § 99-19-47.

Clerk of the court to deliver to commissioner of corrections warrant for the execution of condemned person, see § 99-19-55.

## JUDICIAL DECISIONS

### 1. In general.

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to this section may be introduced in evidence as proof of such conviction; the absence of a limit on con-

sideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. *Pace v. State*, 407 So. 2d 530 (Miss. 1981), overruled on other grounds, *Hopson v. State*, 625 So. 2d 395 (Miss. 1993).

RESEARCH REFERENCES

Am Jur. 21 Am. Jur. 2d, Criminal Law  
§ 934.

**§ 99-19-47. Commitment to penitentiary; form.**

The following form, to be furnished by the county, shall be used in transmitting the required data:

"Commitment of \_\_\_\_\_ (insert name of person)

Circuit Court, County of \_\_\_\_\_.

To the Mississippi Department of Corrections:

You are hereby notified that at the \_\_\_\_\_ term, 2\_\_\_\_\_, of the circuit court, Judge \_\_\_\_\_ presiding, the following named person was tried, convicted and sentenced to a term in the State Penitentiary, as follows:

Name \_\_\_\_\_ Alias \_\_\_\_\_

Crime \_\_\_\_\_ Social Security No. \_\_\_\_\_

Sex \_\_\_\_\_

Race \_\_\_\_\_

Appealed \_\_\_\_\_

Remarks:

\_\_\_\_\_  
\_\_\_\_\_

Dated \_\_\_\_\_, 2\_\_\_\_\_, \_\_\_\_\_ Clerk."

**SOURCES:** Codes, Hemingway's 1917, § 1281; Laws, 1930, § 1306; Laws, 1942, § 2549; Laws, 1912, ch. 147; Laws, 1991, ch. 379 § 2; Laws, 2006, ch. 455, § 2, eff from and after July 1, 2006.

**Amendment Notes** — The 2006 amendment deleted "Date of sentence," "Term of sentence," and "Give brief summary of crime committed" from the commitment form; and inserted "Social Security No." in the commitment form.

**Cross References** — Probation and parole generally, see §§ 47-7-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

**§ 99-19-48. Placement of person on probation; form for report.**

The following form, to be furnished by the county, shall be used in transmitting the required data for any individual placed on probation under the supervision of the Division of Community Corrections of the Department of Corrections:

"Circuit Court, County of \_\_\_\_\_.

To the Mississippi Department of Corrections:

You are hereby notified that at the \_\_\_\_\_ term, 2\_\_\_\_\_, of the circuit court, Judge \_\_\_\_\_ presiding, the following named person was tried,



convicted and sentenced to a term in the State Penitentiary. The sentence was suspended and the person was placed on probation:

Name \_\_\_\_\_ Alias \_\_\_\_\_  
 Date of sentence \_\_\_\_\_ Crime \_\_\_\_\_  
 Term of sentence \_\_\_\_\_ Sex \_\_\_\_\_  
 Race \_\_\_\_\_ Appealed \_\_\_\_\_  
 Remarks: Give brief summary of crime committed. \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Dated \_\_\_\_\_, 2\_\_\_\_\_. \_\_\_\_\_ Clerk."

**SOURCES:** Laws, 1991, ch. 379, § 3; Laws, 2002, ch. 624, § 11, eff from and after July 1, 2002.

**Cross References** — Probation and parole generally, see §§ 47-7-1 et seq.

### § 99-19-49. Repealed.

Repealed by Laws, 2000, ch. 569, § 18, eff from and after passage July 1, 2000.

[Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(10); 1857, ch. 64, art. 309; 1871, § 2810; 1880, § 3085; 1892, § 1442; Laws, 1906, § 1515; Hemingway's 1917, § 1273; Laws, 1930, § 1296; Laws, 1942, § 2539; Laws, 1984, ch. 448, § 1, eff from and after July 1, 1984.]

**Editor's Note** — Former § 99-19-49 provided for the setting of a day for the execution of a death sentence. For current similar provisions, see § 99-19-106.

Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.'"

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

### § 99-19-51. Manner of execution of death sentence.

The manner of inflicting the punishment of death shall be by continuous intravenous administration of a lethal quantity of an ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(24); 1857, ch. 64, art. 323; 1871, § 2816; 1880, § 3091; 1892, § 1447; Laws, 1906, § 1520; Hemingway's 1917, § 1282; Laws, 1930, § 1307; Laws, 1942, § 2550; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 1; Laws, 1984, ch. 448, § 2; Laws, 1994, ch. 479, § 1; Laws, 1998, ch. 404, § 1, eff from and after passage (approved March 18, 1998).

**Cross References** — Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

Infliction of death sentence as exception to practice of nursing or medicine, see §§ 73-15-7, 99-19-53.

Execution of death sentence procedure, witnesses, certificate of execution and disposition of body, see § 99-19-55.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

## JUDICIAL DECISIONS

### 1. In general.

A capital murder defendant was erroneously sentenced to death by "lethal gas" rather than death by "lethal injection," the manner of execution provided by subsection (1) of this section, and therefore the case would be remanded for modification of the sentence to comply with the statute. *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an *ex post facto* law as to persons who were sen-

tenced to death before the enactment of statute. *Wetzel v. Wiggins*, 226 Miss. 671, 85 So. 2d 469 (1956), appeal dismissed, cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39 (1956), reh'g denied, 352 U.S. 919, 77 S. Ct. 217, 1 L. Ed. 2d 125 (1956).

Where prior to the date of execution set for the defendant, the method thereof was changed from hanging to electrocution by means of an electric chair but no chair had as yet been obtained when such date arrived, resentencing and fixing another date for the execution was not a taking of defendant's life without due process of law. *Childress v. State*, 1 So. 2d 494 (Miss. 1941).

## RESEARCH REFERENCES

**ALR.** Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.A. §§ 3591 et seq. 195 A.L.R. Fed. 1.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 961, 962.

**CJS.** 24 C.J.S., Criminal Law §§ 2192, 2193.

**Law Reviews.** Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

### § 99-19-53. Execution of death sentence; state executioner.

The state executioner, or his duly authorized representative, shall supervise and inflict the punishment of death as the same is hereby provided. All duties and necessary acts pertaining to the execution of a convict shall be performed by the commissioner of corrections except where such duties and actions are vested in the state executioner. The state executioner shall receive for his services in connection therewith compensation in the sum of five hundred dollars (\$500.00) plus all actual and necessary expenses for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. The executioner may appoint not more than two (2) deputies who shall be paid one hundred fifty dollars (\$150.00) per execution

and mileage as authorized by law, to be paid by the county where the crime was committed, to assist in the infliction of the punishment of death. The executioner may appoint such other assistants as may be required; however, such assistants shall not be entitled to compensation or travel expenses.

Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by law shall not be construed to be the practice of medicine or nursing. Any pharmacist is authorized to dispense drugs to the state executioner without a prescription for the purpose of this chapter.

The state executioner shall be custodian of all equipment and supplies involved in the infliction of the death penalty. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The state executioner shall receive the per diem compensation authorized in Section 25-3-69 in addition to actual and necessary expenses, including mileage as authorized by law, for each day, not to exceed three (3) days each month, spent in maintaining the equipment and supplies involved in the infliction of the death penalty or preparing for an execution which does not occur. Such payments shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

**SOURCES:** Codes, 1942, § 2555; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 3; Laws, 1954, Ex. ch. 33, § 2; Laws, 1955, Ex. ch. 41, § 2; Laws, 1968, ch. 361, § 62; Laws, 1984, ch. 448, § 3, eff from and after July 1, 1984.

**Cross References** — Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

A similar provision excepting infliction of death sentence from definition as and regulation as practice of nursing, see § 73-15-7.

Infliction of death sentence by intravenous injection of drugs or by lethal gas, see § 99-19-51.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

## RESEARCH REFERENCES

**Law Reviews.** Clark, Juveniles and round hole. 10 Miss. C. L. Rev. 169, the death penalty—a square peg in a Spring, 1990.



**§ 99-19-55. Execution of death sentence; procedure; witnesses; certificate of execution; disposition of body.**

(1) Whenever any person shall be condemned to suffer death for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted at 6:00 p.m. or as soon as possible thereafter within the next twenty-four (24) hours at an appropriate place designated by the Commissioner of Corrections on the premises of the Mississippi State Penitentiary at Parchman, Mississippi. All male persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the Department of Corrections and transported to the maximum security cell block at the Mississippi State Penitentiary at Parchman, Mississippi. When the maximum inmate capacity at such maximum security cell block has been reached, the Commissioner of Corrections shall place such male convicts in an appropriate facility on the grounds of the Mississippi State Penitentiary at Parchman, Mississippi. All female persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the Department of Corrections and housed in an appropriate facility designated by the Commissioner of Corrections. Upon final affirmance of the conviction, the punishment shall be imposed in the manner provided by law. The State Executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death in the manner provided by law, it shall be the duty of the clerk of the court to deliver forthwith to the Commissioner of Corrections a warrant for the execution of the condemned person. It shall be the duty of the commissioner forthwith to notify the State Executioner of the date of the execution and it shall be the duty of the said State Executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the Commissioner of Corrections shall secure the presence at such execution of the sheriff, or his deputy, of the county of conviction, at least one (1) but not more than two (2) physicians or the county coroner where the execution takes place, and bona fide members of the press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel, not exceeding two (2), as said condemned person shall name. The Commissioner of Corrections shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the commissioner may permit two (2) members of the condemned person's immediate family as witnesses, if they so request and two (2) members of the victim's immediate family as witnesses, if they so request. Provided further, that the Governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs or other recordings of any type during the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution.

(3) The State Executioner, or his duly authorized representative, the Commissioner of Corrections, or his duly authorized representative, and the physician or physicians or county coroner who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of Sections 99-19-51 through 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the State Executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The Commissioner of Corrections shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The Commissioner may donate the unclaimed body of an executed person to the University of Mississippi Medical Center for scientific purposes. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends or donated to the University of Mississippi Medical Center.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(25); 1857, ch. 64, art. 324; 1871, § 2817; 1880, § 3092; 1892, § 1448; Laws, 1906, § 1521; Hemingway's 1917, § 1283; Laws, 1930, § 1308; Laws, 1942, § 2551; Laws, 1924, ch. 229; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 2; Laws, 1954, Ex. ch. 33, § 1; Laws, 1955, Ex. ch. 41, § 1; Laws, 1984, ch. 448, § 4; Laws, 1994, ch. 479, § 2; Laws, 1998, ch. 361, § 1, eff from and after July 1, 1998.

**Cross References** — Disposition of unclaimed bodies generally, see § 41-39-5.

Anatomical gift law, see §§ 41-39-31 et seq.

Autopsies on bodies of prisoners, generally, see § 47-5-151.

Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

Manner of execution of death sentence, see § 99-19-51.

State executioner generally, see § 99-19-53.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

## RESEARCH REFERENCES

**ALR.** Validity of rules and regulations concerning viewing of execution of death penalty. 107 A.L.R.5th 291.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 956 et seq.

**CJS.** 24B C.J.S., Criminal Law §§ 2002, 2003.

**Law Reviews.** Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

**§ 99-19-57. Execution of death sentence; suspension of sentence when convict is insane or pregnant.**

(1) If the commissioner of corrections shall, at any time, be satisfied that any female convict in his custody under sentence of death is pregnant, he shall summon a physician to inquire into such pregnancy. The commissioner shall summons and swear all necessary witnesses and the commissioner after full examination shall certify under his hand what the truth may be in relation to the alleged pregnancy, and in case such convict shall be found pregnant, the commissioner shall immediately transmit his findings to the governor, and the governor shall suspend the execution of the sentence until he is satisfied that the convict is not or is no longer pregnant. The governor shall then order, by his warrant to the commissioner, the execution of the convict on a day to be therein appointed by the governor according to the sentence and judgment of the court.

(2)(a) If it is believed that a convict under sentence of death has become insane since the judgment of the court, the following shall be the exclusive procedural and substantive procedure. The convict, or a person acting as his next friend, or the commissioner of corrections may file an appropriate application seeking post conviction relief with the Mississippi Supreme Court. If it is found that the convict is insane, as defined in this subsection, the court shall suspend the execution of the sentence. The convict shall then be committed to the forensic unit of the Mississippi State Hospital at Whitfield. The order of commitment shall require that the convict be examined and a written report be furnished to the court at that time and every month thereafter stating whether there is a substantial probability that the convict will become sane under this subsection within the foreseeable future and whether progress is being made toward that goal. If at any time during such commitment the appropriate official at the state hospital shall consider the convict is sane under this subsection, such official shall promptly notify the court to that effect in writing, and place the convict in the custody of the commissioner of corrections. The court shall thereupon conduct a hearing on the sanity of the convict. The finding of the circuit court is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act.

(b) For the purposes of this subsection, a person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(15-21); 1857, ch. 64, art. 326; 1871, § 2819; 1880, § 3094; 1892, § 1450; Laws, 1906, § 1523; Hemingway's 1917, § 1285; Laws, 1930, § 1310; Laws, 1942, § 2558; Laws, 1926, ch. 186; Laws, 1984, ch. 448, § 5, eff from and after July 1, 1984.



**Cross References** — Pretrial insanity proceedings, see §§ 99-13-1 et seq.

Confinement of female prisoners sentenced to death, see § 99-19-55.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Procedural effect of final order in post-conviction collateral relief proceeding, see § 99-39-23.

Procedural effect of dismissal or denial of application for leave to proceed in trial court for post-conviction collateral relief, see § 99-39-27.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

## JUDICIAL DECISIONS

### 1. In general.

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on subsection (2)(b) of this section and *Ford v. Wainwright* (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

Intelligence is a relevant factor to consider in a competency hearing; it is conceivable that one could be so intellectually deficient that he or she could not possibly comprehend the crime, have a rational understanding of what it means to be executed, have the ability to rationally connect the crime with the execution, or have the ability to assist counsel. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

This section does not unconstitutionally restrict rights of defendants, as it is harmonious with the import of the Eighth Amendment prohibition against cruel and unusual punishment as interpreted in *Ford v. Wainwright* (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

The execution of a defendant who had been repeatedly diagnosed as a chronic

paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

Imposition of the death penalty was not improper on the grounds that the defendant had an I.Q. of 61, had been plagued in the past with experiencing hallucinations, had gone on destructive rampages, had on 2 prior occasions been placed in mental institutions, and was an alcoholic and a chronic drug abuser. Since the defendant suffered only from minor mental disabilities, his disabilities did not bar execution. *Lanier v. State*, 533 So. 2d 473 (Miss. 1988).

Defendant was entitled to in-court opportunity to prove his claims of present insanity where he had presented allegations under oath which, if true, brought into serious question legality of execution under both state and federal law; defendant had presented court with application for relief backed by affidavits of 3 mental health professionals. *Billiot v. State*, 515 So. 2d 1234 (Miss. 1987).

Affidavits of clinical psychologists and psychiatrists failed to establish reasonable probability that defendant was insane, where he alleged insanity as bar to his execution on grounds of cruel and unusual punishment. *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987).

State is prohibited by Eighth Amendment from inflicting death penalty on prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

State is not required to resolve death row inmate's claim that he has become

insane since his conviction, warranting stay of his execution under subsection (2) of this section by means of formal trial, as state may properly presume that inmate, who in order to have been convicted and sentenced must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise serious question for trial court, that inmate's mental state remains same at time sentence is to be carried out, and that allegation of change of mental state requires substantial threshold showing of insanity merely to trigger hearing process, and constitutionally acceptable procedure requires only that state provide impartial hearing officer or board that can receive evidence from prisoner's counsel, including expert psychiatric evidence that may differ from state's own psychiatric evidence. *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987), cert. denied, 481 U.S. 1061, 107 S. Ct. 2207, 95 L. Ed. 2d 861 (1987).

Finding at trial that criminal defendant is presently sane is res judicata as to issue of present sanity of convicted defendant under sentence of death where defendant claims that present mental condition

stems from that existing prior to time of offense and trial. *Billiot v. State*, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986).

This section [Code 1942, § 2558] is not the exclusive remedy to have execution of convicted murderer stayed on the ground that he was insane. *Musselwhite v. State*, 215 Miss. 363, 60 So. 2d 807 (1952).

On petition to stay execution of a murderer on the ground that he was insane, technical perfection of pleading was not required. *Musselwhite v. State*, 215 Miss. 363, 60 So. 2d 807 (1952).

On a petition for stay of execution of a convicted murderer on the ground that he was insane, the trial judge before whom the accused was convicted and sentenced, should not have limited the stay of execution to periods pending appeal but should have stayed execution until the convicted murderer should be adjudged sane. *Musselwhite v. State*, 215 Miss. 363, 60 So. 2d 807 (1952).

In proceeding for order fixing date for execution of death sentence, convict could present answer or suggestion of insanity. *Lewis v. State*, 155 Miss. 810, 125 So. 419 (1930).

## RESEARCH REFERENCES

**ALR.** Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

Propriety of imposing capital punishment on mentally retarded individuals. 20 A.L.R.5th 177.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq.) based on aberrant behavior. 164 A.L.R. Fed. 61.

**Am Jur.** 21 Am. Jur. 2d, Criminal Law §§ 119 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2142, 2194.

**Law Reviews.** Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

## § 99-19-59. Repealed.

Repealed by Laws, 1984, ch. 448, § 10, eff from and after July 1, 1984.

[Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(22); 1857, ch. 64, art. 327; 1871, § 2820; 1880, § 3095; 1892, § 1451; 1906, § 1524; Hemingway's 1917, § 1286; 1930, § 1311; 1942, § 2559]

**Editor's Note** — Former § 99-19-59 was entitled: Execution of death sentence; procedure when execution does not take place as ordered.

**§ 99-19-61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.**

The commissioner of corrections is hereby authorized and empowered to pay out of any available funds of the department of corrections all lawful costs, fees, and expenses and/or the costs of the execution of any person, not a legal resident of Sunflower County, Mississippi, who is charged, tried and/or executed for the commission of a crime within the confines of the penitentiary, or any crime committed outside the bounds of the land of the penitentiary by any inmate lawfully charged thereto. Such costs shall include the reasonable expense of burial in the event the person is executed and the body is not claimed by relatives or friends, and any and all other expenses required to be borne by the state of Mississippi under the provisions of Sections 99-19-53 and 99-19-55. It is intended hereby to provide a means and method and source of payment of such expenses which said sections require to be borne by the state.

**SOURCES:** Codes, 1942, § 2559.5; Laws, 1955, Ex. ch. 44; Laws, 1964, ch. 359; Laws, 1984, ch. 448, § 6, eff from and after July 1, 1984.

**Cross References** — Payment of costs of criminal prosecutions generally, see Miss Const Art. 14, § 261.

Disposition of unclaimed bodies generally, see § 41-39-5.

Disposition of body following execution of death sentence generally, see § 99-19-55.

**§ 99-19-63. Repealed.**

Repealed by Laws, 1980, ch. 555, § 9, eff from and after July 1, 1980.

[Codes, 1942, § 2611.5; Laws, 1962, ch. 299, §§ 1-4; 1964, ch. 360, §§ 1-5]

**Editor's Note** — Former § 99-19-63 was entitled: Report of certain convictions. For Mississippi Justice Information Center and current provisions regarding maintenance and submission of records, fingerprints, photographs and other data, see §§ 45-27-1 et seq.

**§ 99-19-65. Collection of fines, penalties, and list reported.**

The clerk of the circuit court shall, immediately after the adjournment of every term, issue execution according to the nature of the case, for all fines, penalties and forfeitures assessed by the court, or which shall have accrued to the state or to the county, and remaining due and unpaid. Said clerk shall, within thirty days after such adjournment, transmit a list of said executions to the clerk of the board of supervisors of the county, noting the names of the defendants, the amounts, and the sheriff or other officer to whom the same was delivered; and, at the same time he shall transmit to said clerk a statement of the returns made by the sheriff or other officer on execution for fines, penalties, and forfeitures returnable to the last term of the court. Any circuit court clerk who shall fail to issue such executions, or to transmit the lists thereof as required, shall forfeit and pay the sum of two hundred dollars for every such



offense, to be recovered by the state or county, on motion against him and his sureties by the district attorney, before the circuit court. The clerk of the board of supervisors shall notify the district attorney of such default.

**SOURCES:** Codes, 1857, ch. 61, art 304; 1871, § 867; 1880, § 1785; 1892, § 764; Laws, 1906, § 826; Hemingway's 1917, § 614; Laws, 1930, § 618; Laws, 1942, § 1562.

**Cross References** — Duty of clerk of justice court to collect and report fines, see § 9-11-19.

Duty of clerk of board of supervisors, see § 19-3-27.

Duty of district attorney as to fines and penalties, see § 25-31-23.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations, misdemeanors and felonies, see § 99-19-73.

### RESEARCH REFERENCES

**Am Jur.** 15A Am. Jur. 2d, Clerks of Court §§ 29, 33. **CJS.** 21 C.J.S., Courts §§ 333, 334 et seq.

### § 99-19-67. Remedy against officer, in reference to fines.

If any sheriff or other officer shall return on any such writ of execution, that he hath levied the fine, penalty, or forfeiture therein mentioned, or any part thereof; or, that he hath taken the body of the defendant, and shall have suffered such defendant to escape; or, if any person be committed to the custody of such sheriff or other officer until the fine, penalty, or forfeiture for which he was committed shall be paid, and such sheriff or officer shall permit such defendant to escape; or, if such sheriff or officer shall have received such fine, penalty, or forfeiture, or any part thereof, and shall not immediately account to the clerk of the board of supervisors and pay the same into the treasury of the county, then, in either of the cases above specified, it shall be the duty of said clerk to notify the district attorney of such default, who shall thereupon, on motion at the next term of the circuit court, demand judgment against such sheriff, or other officer, and his sureties, for the fines, penalties, and forfeitures mentioned in such writs, or for so much thereof as he shall have received on such execution or commitment, or the whole amount thereof in case he shall have suffered such defendant or defendants to escape; and the court shall give judgment accordingly, and award execution thereon.

**SOURCES:** Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; Laws, 1906, § 828; Hemingway's 1917, § 616; Laws, 1930, § 619; Laws, 1942, § 1563.

**Cross References** — Liability of clerk of justice court for money collected, see § 9-11-23.

Another section derived from same 1942 code section, see § 11-7-219.

Failure of constable to execute and return execution, see § 19-19-9.

Liability of sheriff for mishandling money collected, see §§ 19-25-39 et seq.

Remedies against persons having custody of convict for escape of prisoner, see § 97-9-35.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations, misdemeanors and felonies, see § 99-19-73.

### RESEARCH REFERENCES

**Am Jur.** 63 Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

**CJS.** 67 C.J.S., Officers and Public Employees §§ 259, 260 et seq.

### § 99-19-69. Liability of officers for default as to fines.

Clerks, sheriffs, and other officers shall be liable to the same proceedings for any neglect of duty, in respect to executions for fines, penalties, and forfeitures, as in case of executions in civil cases.

**SOURCES:** Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; Laws, 1906, § 828; Hemingway's 1917, § 616; Laws, 1930, § 620; Laws, 1942, § 1564.

**Cross References** — Motions against officers for money collected, see § 9-7-89.

Liability of officers for default as to fines in civil cases, see § 11-7-221.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations misdemeanors and felonies, see § 99-19-73.

### § 99-19-71. Expunction of misdemeanor conviction of first offender upon petition.

(1) Any person who has been convicted of a misdemeanor, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court, as may be applicable, for an order to expunge any such conviction from all public records. Upon entering such order, a nonpublic record thereof shall be retained by the court and by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, such person is a first offender. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest. No person as to whom such order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest or conviction in response to any inquiry made of him for any purpose, except for the purpose of determining in any subsequent proceedings under this section, whether such person is a first offender.

(2) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

**SOURCES:** Laws, 1986, ch. 412; Laws, 1987, ch. 380, § 2; Laws, 1996, ch. 454, § 5; Laws, 2003, ch. 557, § 4, eff from and after passage (approved Apr. 24, 2003.)

**Cross References** — Other provisions relative to expunction of records, see §§ 21-23-7, 41-29-150, 43-21-159.

Application of this section to the powers of the municipal court to expunge a misdemeanor conviction occurring prior to a person's 23rd birthday, see § 21-23-7.

## JUDICIAL DECISIONS

### 1. In general.

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungment of criminal offender records in limited cases—youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungment of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of § 99-15-26 may apply to the court for an order expunging his or her criminal records.

Under §§ 99-15-57 and 99-15-26 a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to §§ 99-15-57 and 99-15-26 if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the “within 6 months prior to” March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing expungment, and thus the trial court did not err in denying his petition for expungment. *Caldwell v. State*, 564 So. 2d 1371 (Miss. 1990).

## ATTORNEY GENERAL OPINIONS

The statute does not apply to allow the expunction of pretrial intervention records. *Spann*, March 17, 2000, A.G. Op. #2000-0106.

Section 99-19-71(1) allows the court some discretion in granting an expungement; subsection (2) of the statute is mandatory and the court does not have discretion in granting an expungement under those circumstances. *Carson*, May 9, 2003, A.G. Op. 03-0211.

Once an offense has been expunged, it cannot be used to enhance a penalty for a subsequent offense. *Carson*, May 9, 2003, A.G. Op. 03-0211.

The term “first offender” as used in this section means an individual who has no prior non-traffic convictions of any offense. *Mitchell*, Oct. 24, 2003, A.G. Op. 03-0566.

### § 99-19-73. Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.

(1) **Traffic violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine



or other penalty for any violation in Title 63, Mississippi Code of 1972, except offenses relating to the Mississippi Implied Consent Law (Sections 63-11-1 et seq.) and offenses relating to vehicular parking or registration:

FUND	AMOUNT
State Court Education Fund .....	\$ 1.50
State Prosecutor Education Fund .....	1.00
Vulnerable Adults Training, Investigation and Prosecution Trust Fund .....	50
Child Support Prosecution Trust Fund .....	50
Driver Training Penalty Assessment Fund .....	7.00
Law Enforcement Officers Training Fund .....	5.00
Spinal Cord and Head Injury Trust Fund (for all moving violations) .....	6.00
Emergency Medical Services Operating Fund .....	15.00
Mississippi Leadership Council on Aging Fund .....	1.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund .....	50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund .....	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for legal assistants to district attorneys .....	1.50
Crisis Intervention Mental Health Fund .....	10.00
Drug Court Fund .....	10.00
Capital Defense Counsel Fund .....	2.89
Indigent Appeals Fund .....	2.29
Capital Post-Conviction Counsel Fund .....	2.33
Victims of Domestic Violence Fund .....	49
Public Defenders Education Fund .....	1.00
TOTAL STATE ASSESSMENT .....	\$ 69.50

(2) **Implied Consent Law violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or any other penalty for any violation of the Mississippi Implied Consent Law (Section 63-11-1 et seq.):

FUND	AMOUNT
Crime Victims' Compensation Fund .....	\$ 10.00
State Court Education Fund .....	1.50
State Prosecutor Education Fund .....	1.00
Vulnerable Adults Training, Investigation and Prosecution Trust Fund .....	50
Child Support Prosecution Trust Fund .....	50
Driver Training Penalty Assessment Fund .....	22.00
Law Enforcement Officers Training Fund .....	11.00
Emergency Medical Services Operating Fund .....	15.00

Mississippi Alcohol Safety Education Program Fund .....	5.00
Federal-State Alcohol Program Fund .....	10.00
Mississippi Crime Laboratory	
Implied Consent Law Fund .....	25.00
Spinal Cord and Head Injury Trust Fund .....	25.00
Capital Defense Counsel Fund .....	2.89
Indigent Appeals Fund .....	2.29
Capital Post-Conviction Counsel Fund .....	2.33
Victims of Domestic Violence Fund .....	49
State General Fund .....	35.00
Law Enforcement Officers and Fire Fighters Death	
Benefits Trust Fund .....	50
Law Enforcement Officers and Fire Fighters Disability	
Benefits Trust Fund .....	1.00
State Prosecutor Compensation Fund for the purpose	
of providing additional compensation for legal	
assistants to district attorneys .....	1.50
Crisis Intervention Mental Health Fund .....	10.00
Drug Court Fund .....	10.00
Statewide Victims' Information and Notification	
System Fund .....	6.00
Public Defenders Education Fund .....	1.00
TOTAL STATE ASSESSMENT .....	\$ 199.50

(3) **Game and Fish Law violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation of the game and fish statutes or regulations of this state:

FUND	AMOUNT
State Court Education Fund .....	\$ 1.50
State Prosecutor Education Fund .....	1.00
Law Enforcement Officers Training Fund .....	5.00
Hunter Education and Training Program Fund .....	5.00
State General Fund .....	30.00
Law Enforcement Officers and Fire Fighters Death	
Benefits Trust Fund .....	50
Law Enforcement Officers and Fire Fighters Disability	
Benefits Trust Fund .....	1.00
State Prosecutor Compensation Fund for the purpose	
of providing additional compensation for legal	
assistants to district attorneys .....	1.00
Crisis Intervention Mental Health Fund .....	10.00
Drug Court Fund .....	10.00
Capital Defense Counsel Fund .....	2.89
Indigent Appeals Fund .....	2.29
Capital Post-Conviction Counsel Fund .....	2.33

Victims of Domestic Violence Fund .....	49
Public Defenders Education Fund .....	1.00
TOTAL STATE ASSESSMENT .....	\$ 74.00

(4) **Litter Law violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation of Section 97-15-29 or 97-15-30:

FUND	AMOUNT
Statewide Litter Prevention Fund .....	\$ 25.00
TOTAL STATE ASSESSMENT .....	\$ 25.00

(5) **Other misdemeanors.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any misdemeanor violation not specified in subsection (1), (2) or (3) of this section, except offenses relating to vehicular parking or registration:

FUND	AMOUNT
Crime Victims' Compensation Fund .....	\$ 10.00
State Court Education Fund .....	1.50
State Prosecutor Education Fund .....	1.00
Vulnerable Adults Training, Investigation and Prosecution Trust Fund .....	50
Child Support Prosecution Trust Fund .....	50
Law Enforcement Officers Training Fund .....	5.00
Capital Defense Counsel Fund .....	2.89
Indigent Appeals Fund .....	2.29
Capital Post-Conviction Counsel Fund .....	2.33
Victims of Domestic Violence Fund .....	49
State General Fund .....	30.00
State Crime Stoppers Fund .....	1.50
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund .....	50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund .....	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for legal assistants to district attorneys .....	1.50
Crisis Intervention Mental Health Fund .....	10.00
Drug Court Fund .....	8.00
Judicial Performance Fund .....	2.00
Statewide Victims' Information and Notification System Fund .....	6.00
Public Defenders Education Fund .....	1.00
TOTAL STATE ASSESSMENT .....	\$ 88.00



(6) **Other felonies.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any felony violation not specified in subsection (1), (2) or (3) of this section:

FUND	AMOUNT
Crime Victims' Compensation Fund .....	\$ 10.00
State Court Education Fund .....	1.50
State Prosecutor Education Fund .....	1.00
Vulnerable Adults Training, Investigation and Prosecution Trust Fund .....	50
Child Support Prosecution Trust Fund .....	50
Law Enforcement Officers Training Fund .....	5.00
Capital Defense Counsel Fund .....	2.89
Indigent Appeals Fund .....	2.29
Capital Post-Conviction Counsel Fund .....	2.33
Victims of Domestic Violence Fund .....	49
State General Fund .....	60.00
Criminal Justice Fund .....	50.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund .....	50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund .....	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for legal assistants to district attorneys .....	1.50
Crisis Intervention Mental Health Fund .....	10.00
Drug Court Fund .....	10.00
Statewide Victims' Information and Notification System Fund .....	6.00
Public Defenders Education Fund .....	1.00
TOTAL STATE ASSESSMENT .....	\$ 166.50

(7) If a fine or other penalty imposed is suspended, in whole or in part, such suspension shall not affect the state assessment under this section. No state assessment imposed under the provisions of this section may be suspended or reduced by the court.

(8) After a determination by the court of the amount due, it shall be the duty of the clerk of the court to promptly collect all state assessments imposed under the provisions of this section. The state assessments imposed under the provisions of this section may not be paid by personal check. It shall be the duty of the chancery clerk of each county to deposit all such state assessments collected in the circuit, county and justice courts in such county on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The chancery clerk shall make a monthly lump-sum deposit of the total state assessments collected in the circuit, county and justice courts in such county under this section, and shall report to the Department of

Finance and Administration the total number of violations under each subsection for which state assessments were collected in the circuit, county and justice courts in such county during such month. It shall be the duty of the municipal clerk of each municipality to deposit all such state assessments collected in the municipal court in such municipality on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The municipal clerk shall make a monthly lump-sum deposit of the total state assessments collected in the municipal court in such municipality under this section, and shall report to the Department of Finance and Administration the total number of violations under each subsection for which state assessments were collected in the municipal court in such municipality during such month.

(9) It shall be the duty of the Department of Finance and Administration to deposit on a monthly basis all such state assessments into the proper special fund in the State Treasury. The monthly deposit shall be based upon the number of violations reported under each subsection and the pro rata amount of such assessment due to the appropriate special fund. The Department of Finance and Administration shall issue regulations providing for the proper allocation of these special funds.

(10) The State Auditor shall establish by regulation procedures for refunds of state assessments, including refunds associated with assessments imposed before July 1, 1990, and refunds after appeals in which the defendant's conviction is reversed. The Auditor shall provide in such regulations for certification of eligibility for refunds and may require the defendant seeking a refund to submit a verified copy of a court order or abstract by which such defendant is entitled to a refund. All refunds of state assessments shall be made in accordance with the procedures established by the Auditor.

**SOURCES:** Laws, 1990, ch. 329, § 1; Laws, 1991, ch. 356, § 3; Laws, 1995, ch. 500, § 2; Laws, 1996, ch. 505, § 7; Laws, 1996, ch. 506, § 14; Laws, 1997, ch. 550, § 3; Laws, 1997, ch. 574, § 2; Laws, 1998, ch. 429, § 7; Laws, 2001, ch. 417, § 1; Laws, 2002, ch. 622, § 1; Laws, 2003, ch. 425, § 1; Laws, 2004, ch. 535, § 1; Laws, 2004, ch. 543, § 4; Laws, 2005, ch. 406, § 2; Laws, 2005, ch. 413, § 5; Laws, 2005, 2nd Ex Sess, ch. 1, § 4; Laws, 2006, ch. 581, § 2; Laws, 2007, ch. 332, § 1; Laws, 2007, ch. 559, § 3; Laws, 2007, ch. 578, § 1, eff from and after July 1, 2007.

**Joint Legislative Committee Note** — Section 1 of ch. 535 Laws of 2004, effective from and after July 1, 2004 (approved May 12, 2004), amended this section. Section 4 of ch. 543, Laws of 2004, effective from and after July 1, 2004 (approved May 13, 2004), also amended this section. As set out above, this section reflects the language of Section 4 of ch. 543, Laws of 2004, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 2 of ch. 406, Laws of 2005, effective July 1, 2005 (approved April 20, 2005), amended this section. Section 5 of ch. 413, Laws of 2005, also amended this section. The amendments made by the two bills were nonconforming and did not meet the criteria for integration by the Joint Legislative Committee on Compilation, Revision and

Publication of Legislation. However, the conflict was resolved by passage of Section 4 of ch. 1 of Laws of 2005, 2nd Ex Sess, the text of which is reflected in the section as set out above.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected typographical errors in the amounts of the Total State Assessments as amended by Laws of 2005, 2nd Ex Sess, ch. 1, § 4. The Joint Committee ratified the corrections at its June 29, 2005 meeting.

Section 1 of ch. 1, Laws, 2007, effective July 1, 2007 (approved March 13, 2007), amended this section. Section 3 of ch. 559, Laws 2007, effective July 1, 2007 (approved April 20, 2007), also amended this section. Section 1 of ch. 578, Laws, 2007, effective July 1, 2007 (approved April 21, 2007), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 578, Laws, 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

**Editor's Note** — Section 7-7-2 provides that the words “State Auditor of Public Accounts,” “State Auditor” and “Auditor” appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer whenever they appear. Section 27-104-6 provides that wherever the term “State Fiscal Officer” appears in any law it shall mean “Executive Director of the Department of Finance and Administration.”

**Amendment Notes** — The first 2005 amendment, (ch. 406) added entries for the “Law Enforcement Officers Disability Benefits Trust Fund” to the list of funds in (2), (3), (5), and (6).

The second 2005 amendment (ch. 413), at the end of (1) through (6), added assessments for the following funds: Capital Defense Counsel Fund, Indigent Appeals Fund, Capital Post-Conviction Counsel Fund, and Victims of Domestic Violence Fund.

The third 2005 amendment (2nd Ex Sess, ch. 1) increased the standard state monetary assessments; increased funding for assistant district attorneys; added assessments to fund the Law Enforcement Officers Disability Benefits Trust Fund, the Vulnerable Adults Training, Investigation and Prosecution Trust Fund, and the Child Support Prosecution Trust Fund; revised the assessments dedicated to the Spinal Cord and Head Injury Trust Fund; and removed assessments for litter law violations dedicated to the State Prosecutor Compensation Fund for the purpose of providing additional compensation for legal assistants to district attorneys, the Crisis Intervention Mental Health Fund, and the Drug Court Fund.

The 2006 amendment substituted “Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund” for “Law Enforcement Officers Disability Benefits Trust Fund” throughout the section.

The first 2007 amendment (ch. 332) substituted “2.89” for “1.89” in the “Capital Defense Counsel Fund” line item throughout; and in the “TOTAL STATE ASSESSMENT” line item, substituted “68.50” for “67.50” in (1), “192.50” for “191.50” in (2), “73.00” for “72.00” in (3), “81.00” for “80.00” in (5), and “159.50” for “158.50” in (6).

The second 2007 amendment (ch. 559) added the “Public Defenders Education Fund” assessment to the list of assessments in (1), (2), (3), (5) and (6) and the “Statewide Victims' Information and Notification System Fund” to the list of assessments in (2), (5) and (6), and updated the TOTAL STATE ASSESSMENT entries accordingly.

The third 2007 amendment (ch. 578) added the “Public Defenders Education Fund” assessment to the list of assessments in (1), (2), (3), (5) and (6) and the “Statewide Victims' Information and Notification System Fund” to the list of assessments in (2), (5) and (6), and updated the TOTAL STATE ASSESSMENT entries accordingly.

**Cross References** — Driver Training Penalty Assessment Fund, see § 37-25-17.

State Court Education Fund and State Prosecutor Education Fund, see § 37-26-9.

Emergency Medical Services Operating Fund, see § 41-59-61.



- Law Enforcement Officers Training Fund, see § 45-6-15.
- Hunter Education and Training Program, see § 49-1-65.
- Mississippi Alcohol Safety Education Program Fund and the Federal-State Alcohol Program Fund, see § 63-11-32.
- Statewide Litter Prevention Fund, see § 65-1-167.
- Disposition of assessments collected under subsection (4) of this section, see § 97-15-29.
- Capital Defense Counsel Fund, see § 99-18-17.
- Criminal Justice Fund, see § 99-19-32.
- Deposit of portion of funds collected pursuant to this section into Criminal Justice Fund, see § 99-19-32.
- Statewide Victims' Information and Notification System Fund, see § 99-45-9.
- Law enforcement officers and fire fighters death benefits trust fund, see § 45-2-1.
- Law enforcement officers and fire fighters disability benefits trust fund, see § 45-2-21.
- Public Defenders Education Fund, see § 99-40-1.

### ATTORNEY GENERAL OPINIONS

State assessment would be levied in event only punishment was period of incarceration; indigent defendant would be subject to paying state assessment, and in event defendant was unable to pay fine and assessment immediately, defendant could pay assessment in installments or participate in public work program. Bounds, August 29, 1990, A.G. Op. #90-0619.

Municipal court clerk is required to report all state assessments collected during each month, notwithstanding said defendant may still owe court additional state assessments that may not be collected until several months later; therefore, municipal court clerk would be required to report all state assessments collected during month regardless of whether or not defendant's total fine had been paid into municipal court. Daniel, Oct. 3, 1990, A.G. Op. #90-0691.

Subsection (6) of this section provides for a state assessment to be collected for any felony violation. Such assessment

should be collected for each violation. Thus, the assessment should be collected twice if the defendant is convicted of two counts. Pryor, April 12, 1996, A.G. Op. #96-0185.

Based on subsection (7) of this section, the state assessment court costs are collected by the clerk of the court regardless of whether the judge imposes them or not. Evans, June 28, 1996, A.G. Op. #96-0428.

If a judge non-adjudicates a DUI charge under § 63-11-30(3) but imposes a \$250.00 fine as a condition of such non-adjudication, such fine is a "penalty" under § 99-19-73 and, therefore, the assessment must be collected. Cruber, Feb. 22, 2002, A.G. Op. #02-0102.

A violation of "no tag", "expired tag", "improper tag", etc. is a violation of § 27-19-131, the operation of a vehicle without the payment of the proper taxes, and the proper state assessment to be levied upon such a conviction is provided for by § 99-19-73(5) — "other misdemeanors." Morgan, Apr. 19, 2002, A.G. Op. #02-0181.

### **§ 99-19-75. Assessment on certain offenses against children to be deposited in Mississippi Children's Trust Fund.**

In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected from each person upon whom a court imposes a fine or other penalty for any violation of Section 97-3-65, 97-5-1 et seq. or 97-3-7, Mississippi Code of 1972, when committed against a minor, an assessment of One Thousand Dollars (\$1,000.00) to be deposited into the Mississippi Children's Trust Fund created in Section 93-21-305, Mississippi

Code of 1972, using the procedures described in Section 99-19-73, Mississippi Code of 1972.

**SOURCES:** Laws, 2005, ch. 516, § 1, eff from and after July 1, 2005.

**Cross References** — Additional monetary assessment for violation of this section when committed against a minor to be deposited in Mississippi Children's Trust Fund, see § 99-19-75.

## SENTENCING OF HABITUAL CRIMINALS

SEC.

- 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.
- 99-19-83. Sentencing of habitual criminals to life imprisonment.
- 99-19-84. Electronic monitoring as condition of probation for offense requiring registration as a sex offender; rules and regulations.
- 99-19-85. Governor's pardoning power unaffected.
- 99-19-87. Punishment by death unaffected.

### § 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

**SOURCES:** Laws, 1976, ch. 470, § 1, eff from and after January 1, 1977.

**Cross References** — Promulgation of rules and regulations concerning earned time allowances for habitual offenders, see § 47-5-138.

Inmate convicted as habitual offender ineligible for earned time allowance on sentence, see § 47-5-139.

Ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

Ineligibility for earned probation program of persons previously convicted of felonies, see § 47-7-47.

Sentencing of habitual criminals to life imprisonment, see § 99-19-83.

## JUDICIAL DECISIONS

- |   |  |
|---|--|
| 1. In general.                                | 7. Sentencing trial or hearing, generally. |
| 2. Sufficiency of prior sentences, generally. | 8. —When held.                             |
| 3. —“Charges separately brought”.             | 9. —As constituting double jeopardy.       |
| 4. —Separate incidents.                       | 10. Out of state convictions.              |
| 5. Proportionality.                           | 11. Amendment of indictment.               |
| 6. Defendant's mistaken belief.               | 12. Sentencing discretion.                 |
|   | 13. Proof of prior conviction or sentence. |

14. Particular circumstances.
15. Sentence not excessive.
- 15.5. Unadjudicated offenses.
16. Appeal of cause, ineffectiveness of counsel.

### 1. In general.

Defendant's argument in the trial court was that his plea was not knowingly, intelligently, freely, and voluntarily given and that he did not receive effective assistance of counsel; defendant argued for the first time on appeal that his sentence was illegal; as such, defendant was barred from raising the issue before the appellate court. *Hargett v. State*, 864 So. 2d 283 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Trial court's failure to hold a separate sentencing hearing before sentencing defendant to life imprisonment without parole following defendant's conviction for armed robbery was harmless because defendant's three prior burglary convictions made the sentence mandatory. *Stevens v. State*, 840 So. 2d 785 (Miss. Ct. App. 2003).

Defendant's conviction of felony shoplifting and five-year sentence without parole as a habitual offender was affirmed, where the appellate court found no merit in his arguments that the indictment was defective and that the jurors' handwritten verdict was ambiguous; nothing in the language of the shoplifting statute, Miss. Code Ann. § 97-23-93, or in the habitual offender statute, Miss. Code Ann. § 99-19-81, protected conviction for a third felony shoplifting offense from the application of normal maximum sentencing rules. *Taylor v. State*, 838 So. 2d 339 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. Ct. App. 2003).

This section does not violate a defendant's constitutional rights to due process or equal protection, and does not violate the constitutional requirements pertaining to separation of powers. *Magee v. State*, 759 So. 2d 464 (Miss. Ct. App. 2000).

A burglary defendant was properly sentenced as a habitual offender under this section based on previous convictions which occurred on the same day and were based on guilty pleas. *Griffin v. State*, 607 So. 2d 1197 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, the court's refusal to allow the defendant to inform the jury about his ineligibility for parole as a habitual offender was error even though the court had not yet adjudicated his habitual offender status. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A second indictment against a defendant, which added that the defendant was charged as a habitual offender, was not an improper amendment without the required action of the grand jury, since the second indictment was not an amendment of the original amendment on motion by the State, but was a second indictment returned by a grand jury. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

A defendant waived his right to indictment for grand larceny, and thus his conviction for grand larceny could be used subsequently to sentence the defendant as a habitual offender, where the defendant was originally indicted for the burglary of 2 automobiles, the defendant appeared before the circuit court and testified under oath that he understood that he was charged with burglary of an automobile in each case, that he wished to withdraw his pleas of not guilty and enter pleas of guilty to related charges of grand larceny, that he understood the nature of the offense of grand larceny, and that he in fact committed those crimes. *Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

The enactment of § 99-19-101, which established the bifurcated procedure in capital cases wherein "the jury shall set the sentence," did not eliminate the necessity of the sentencing procedure under the recidivism statute, this section, and [former] Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice, when an indictment charges both capital murder and habitual status and a trial is conducted. The statutory language does not indicate that the jury in the guilt/sentencing phases of a bifurcated trial is to decide the issue of recidivism when a defendant is tried as a habitual offender on a charge of capital murder. *Hoover v. State*, 552 So. 2d 834 (Miss. 1989).

An accused has no constitutional right to a trial by jury on the question of



whether he or she is a habitual offender. All that is required is that the accused be properly indicted as a habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof. *Keyes v. State*, 549 So. 2d 949 (Miss. 1989).

The application of this section to recidivist murderers, rapists and kidnappers does not violate the Fourteenth Amendment of the United States Constitution even though under the habitual offender statutes, § 99-19-83 and this section, taken together, only those convicted of murder, rape or kidnapping can be sentenced to life without parole without proof of a prior conviction of a crime of violence. *Sutherland v. State*, 537 So. 2d 1360 (Miss. 1989).

In a prosecution for aggravated assault, a rape conviction could be used for enhancement purposes under the habitual offender statute, this section, even though the assault was committed before the conviction of the rape. *Haynes v. State*, 520 So. 2d 1367 (Miss. 1988).

While it is not always necessary for the indictment to recite the statute number under which a defendant is being charged, the better practice is to include it, this is especially so in habitual offender cases where the state may proceed under one of 2 statutes. *Martin v. State*, 501 So. 2d 1124 (Miss. 1987).

This section is not unconstitutional as ex post facto law, nor does it constitute equal protection violation. *Perkins v. Cabana*, 794 F.2d 168 (5th Cir. 1986), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366 (1986).

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that this section imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. *Perkins v. Cabana*, 794 F.2d 168 (5th Cir. 1986), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366 (1986).

A defendant who enters a guilty plea to a felony charge is not entitled, as a constitutional right, to information regarding

the future use of his conviction based on the guilty plea for purposes of enhancement. *Presley v. State*, 498 So. 2d 832 (Miss. 1986).

A defendant convicted of a single charge of grand larceny could not successfully complain because he had been charged in a multi-count indictment which in addition to the grand larceny charge also charged him with conspiracy to commit grand larceny, and a further charge that he was a recidivist in that he had previously been convicted of four separate felonies. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

An indictment which adequately advised defendant of the specific crimes the state would seek to prove that he had previously been convicted of was also sufficient to advise him that the state was seeking enhanced punishment under this section. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

Exercise of prosecutorial discretion in electing, or refusing, to indict criminal defendant under habitual criminal statute (this section) does not constitute encroachment by prosecutor on judicial power to determine appropriate criminal sentence. *Washington v. State*, 478 So. 2d 1028 (Miss. 1985).

Defendant charged with being habitual criminal is not deprived of fair trial because grand jury indicting defendant has been informed of prior convictions; indeed, grand jury of necessity has to be informed of prior convictions before indictment seeking enhanced punishment can be sought by state. *Washington v. State*, 478 So. 2d 1028 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notifies defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under this section. *Smith v. State*, 477 So. 2d 191 (Miss. 1985).

Defendant sentenced as habitual offender has no entitlement to credit for

"good time." *Hardy v. State*, 473 So. 2d 941 (Miss. 1985).

Application of sentencing enhancement statute (this section) to convicted defendant whose prior convictions occurred before January 1, 1977, date this section became effective, does not violate ex post facto clause of United States Constitution. *Smith v. State*, 465 So. 2d 999 (Miss. 1985).

Under this section, the maximum term of imprisonment for rape is that sentence imposed by the trial judge, and sentence must be reasonably less than life. *Friday v. State*, 462 So. 2d 336 (Miss. 1985), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

In a prosecution for burglary the trial court properly sentenced defendant pursuant to this section, despite the fact that one prior conviction of defendant was on appeal at the time of sentencing, where the Legislature in enacting this section intended to adopt the interpretation of "conviction" that when a jury and circuit court return a verdict of guilty it is a "conviction" of the crime charged. *Jackson v. State*, 418 So. 2d 827 (Miss. 1982).

The effect of double enhancement where the crime of carrying a concealed weapon after conviction of a felony is combined with sentencing under the habitual offenders statute does not render the latter statute unconstitutional. Failure of the state to specify in an indictment which section of the habitual criminal statute, this section or § 99-19-83, applies to a defendant is not error since the statutes are not criminal offenses and only affect sentencing. *Osborne v. State*, 404 So. 2d 545 (Miss. 1981).

In sentencing a defendant under this section, the trial judge may consider convictions occurring after the date of the principal offense at issue. *Yates v. State*, 396 So. 2d 629 (Miss. 1981).

## 2. Sufficiency of prior sentences, generally.

Defendant was not prejudiced by the imposition of a forfeiture of good time based on a meritless motion for post-conviction relief because he was not eligible for such as a habitual offender. *Adams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. Feb. 6, 2007).

Because one defendant was convicted of two separate felony counts of transfer of a controlled substance and sentenced to a ten-year term for each count and the sentences ran concurrently, which constituted separate terms under Miss. Code Ann. § 99-19-81, defendant was properly sentenced as a habitual offender. *Collins v. State*, 817 So. 2d 644 (Miss. Ct. App. 2002).

Where a defendant was twice previously judged guilty of distinct felonies on which sentences of one year or more were pronounced, intent was satisfied regarding habitual offender status irrespective of subsequent probation or suspension, statutory. *Green v. State*, 802 So. 2d 181 (Miss. Ct. App. 2001).

The statute does not require an habitual offender to have actually served sentences of more than one year so long as the sentences themselves were more than one year. *Reynolds v. State*, 784 So. 2d 929 (Miss. 2001).

There is no requirement that a prior felony conviction used to enhance a sentence must have been entered before the crime occurred for which sentence is to be pronounced; thus, a defendant's habitual offender status could be based, in part, on a prior conviction which was rendered after the crime at issue, but before the conviction for that crime. *Sims v. State*, 775 So. 2d 1291 (Miss. Ct. App. 2000).

The statute does not preclude the state's use of 14-year-old conviction in sentencing a defendant as a habitual offender. *Sanders v. State*, 760 So. 2d 839 (Miss. Ct. App. 2000).

The fact that a defendant had not actually been incarcerated after receiving sentences for one year or more for 2 separate prior felony convictions did not affect the sufficiency of the sentences as evidence of habitual offender status. *Hewlett v. State*, 607 So. 2d 1097 (Miss. 1992).

Two prior felony convictions could be used to enhance a defendant's punishment, in spite of his arguments that the law does not recognize "attempted criminal assault" as a crime, and that there was no showing on the faces of the sentencing orders of his prior convictions that he made a "knowing and intelligent" plea of guilty, where the record revealed that



prior to the sentencing hearing on the habitual offender indictment, the defendant knowingly and intelligently stipulated that he had been convicted of these crimes and that the convictions were free of constitutional defects. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

Three prior burglary convictions conformed to the requirements of the habitual offender statute, even though a combined sentencing and probation order was issued for the 3 convictions and the defendant contended that he believed that this was a single sentence which he had received for all of the offenses and that he did not believe that he had been convicted 3 times, where 2 of the burglaries took place on the same day and the third burglary took place on a different day, the defendant was separately indicted for each of these offenses, he pled guilty to each of the indictments, and he was originally separately sentenced by the court in each case by a separate order, each appearing in a separate file and on separate pages of the minutes of the court. *White v. State*, 571 So. 2d 956 (Miss. 1990).

A defendant's prior convictions for burglary and grand larceny of 2 school buildings were sufficiently separate and distinct to qualify the defendant for enhanced sentencing since the 2 buildings were separate schools, even though they were geographically proximate, a common walkway connected the 2 buildings, and the schools shared a common auditorium and cafeteria. *Pittman v. State*, 570 So. 2d 1205 (Miss. 1990).

A defendant was properly sentenced as a habitual offender pursuant to this section, even though the habitual offender language of the indictment failed to state the dates of his prior convictions, where all of the information contained in the indictment, and specifically the cause number, afforded the defendant access to the date of judgment. Therefore, the information pertaining to the dates of the judgments was substantially set forth in the indictment and sufficient information was afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment to comply with due process. *Benson v. State*, 551 So. 2d 188 (Miss. 1989).

A defendant convicted of second-degree arson who had previously been convicted and sentenced to a 5-year term for burglary in 1973, and had also been convicted and sentenced to a 3-year term for motor vehicle larceny in 1981, could be sentenced as an habitual offender, notwithstanding that his burglary sentence had been suspended. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

Petitioner was subject to 7-year sentence for burglary, where the documentation presented for sentencing in the trial court indicated that he had 2 prior convictions-for grand larceny and for business burglary-and had been sentenced to separate terms of one year or more in the state penal institution. *Rideout v. State*, 496 So. 2d 667 (Miss. 1986).

While the defendant has a right to be heard at the bifurcated hearing required under the recidivist statutes, where he takes the stand and admits the prior convictions, which are valid on their face, he will not then be heard to challenge the constitutionality of his prior convictions. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

A defendant was entitled to have his sentence as a habitual offender under Mississippi Code § 99-19-83 vacated, where the state at the trial proved that he had 2 felony convictions, but failed to prove that he had actually served one year or more on such convictions. The state's proof would only have sustained a conviction under Mississippi Code § 99-19-81. *Ellis v. State*, 485 So. 2d 1062 (Miss. 1986).

In a prosecution for burglary, the trial properly sentenced defendant as a habitual offender, despite defendant's contention that the habitual offender statute only applied to those habitual offenders twice convicted of distinct felonies who had served sentences through actual incarceration; the statute is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of sub-



sequent probation or suspension of sentence. *Jackson v. State*, 381 So. 2d 1040 (Miss. 1980).

### 3. —“Charges separately brought”.

Two prior burglary convictions, which were relied upon in sentencing a defendant as a habitual offender, were based upon “charges separately brought,” within the meaning of this section even though the 2 Nebraska burglary charges had been presented against him as 2 separate counts of a single information. The mere form of presenting 2 charges as separate counts of a single information or indictment in no way merges those charges except for the limited purpose of judicial economy and procedure. Separation of the charges into separate counts rendered them sufficiently separate to satisfy the mandate of this section that they be “separately brought.” *Kolb v. State*, 568 So. 2d 288 (Miss. 1990).

### 4. —Separate incidents.

Where the record showed that an inmate’s two prior felonies, although occurring on the same day, arose out of separate incidents at different times, the inmate was properly sentenced as a habitual offender. *Jones v. State*, 878 So. 2d 254 (Miss. Ct. App. 2004).

Trial court properly sentenced defendant as a habitual offender where defendant burglarized a dwelling and left with a gun he had just stolen from the home. When pursued by a neighbor, defendant fired the gun into the air, constituting a separate offense of aggravated assault; because the aggravated assault occurred at some point in time later than and at a different location than the burglary, it had nothing to do with the burglary of a dwelling case. *Davis v. State*, 850 So. 2d 176 (Miss. Ct. App. 2003).

Multiple crimes committed during the course of a series of related events may constitute separate and distinct offenses for purposes of this section. *Walls v. State*, 1999 Miss. App. LEXIS 248 (Miss. Ct. App. May 4, 1999), subst. op., 759 So. 2d 483 (Miss. Ct. App. 2000).

A defendant was properly sentenced to life without parole under the habitual offender statute, this section, for convictions of 2 murders, 1 robbery and 2

kidnappings, even though all of the crimes took place on the same day, where the robbery and kidnappings took place separately following the completion of the murders and the murders and the kidnappings occurred at different times and different places and, therefore, were 2 separate “incidents.” *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

Concurrent sentences are “separate terms” under statute for sentencing as recidivist, language of statute requiring simply sentencing to separate terms, specifically omitting requirement that they be served separately or at all. Three prior convictions set out in habitual offender portion of indictment, although two occurred on same date and third a few days later, all arose out of separate incidents. All three guilty pleas were entered on same date and resulted in concurrent 7-year sentences. *Jackson v. State*, 518 So. 2d 1219 (Miss. 1988).

Circuit court did not err in sentencing defendant as habitual offender, although defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. *Buckley v. State*, 511 So. 2d 1354 (Miss. 1987).

A defendant convicted of welfare fraud could be sentenced as a recidivist since her 2 earlier convictions for forgery of 2 separate checks on 2 separate dates constituted separate incidents at different times, notwithstanding that the checks had been purloined from the same person and the same name had been forged on each check. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

Though both of defendant’s convictions occurred on the same day, they arose out of separate incidents occurring at different times, and therefore, the trial court correctly sentenced the defendant under this section. *Rushing v. State*, 461 So. 2d 710 (Miss. 1984).

Defendant, who had been twice previously convicted of burglary and sentenced

to terms of more than one year for each conviction, was properly sentenced as an habitual criminal pursuant to this section, where, although one of the previous offenses occurred on the same day as the one included in the present case, such previous offense was separately brought and arose out of a separate incident which occurred at a different time of day. *Crawley v. State*, 423 So. 2d 128 (Miss. 1982).

In a prosecution for the kidnap and rape of an 8-year-old female child, the habitual offender statute, this section, was inappropriately applied, where the only previous crimes shown to have been committed by the defendant were crimes which arose out of a single incident. *Riddle v. State*, 413 So. 2d 737 (Miss. 1982).

### 5. Proportionality.

Although defendant's sixty-year sentence for possession of marijuana was harsh, in light of his prior felony controlled substance violations and the fact that he was an habitual offender for possession and delivery of marijuana, the sentence was proper. *Tate v. State*, 946 So. 2d 376 (Miss. Ct. App. 2006).

Defendant was sentenced as a habitual offender under Miss. Code Ann. § 99-19-81; although the trial judge was statutorily required to sentence defendant to a maximum of twenty years as a result of his habitual offender status, the judge deviated from the maximum statutorily mandated penalty and sentenced defendant to fifteen years instead; as a result, the facts did not lend themselves to a finding that defendant received a sentence disproportionate to his crime. *Schankin v. State*, 910 So. 2d 1113 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Defendant's 23-year sentence for aggravated assault and possession of a firearm by a felon did not constitute cruel and unusual punishment based on the gravity of the offense, the harshness of the penalty under the habitual offender statute, Miss. Code Ann. § 99-19-81, and the sentences imposed in Mississippi and other jurisdictions for similar crimes. *Everett v. State*, 835 So. 2d 118 (Miss. Ct. App. 2003).

A trial court judge has the discretion to sentence a defendant found to be an ha-

bitual offender to less than the maximum sentence required by this section if the Eighth Amendment proportionality test requires it. To ensure proper proportionality analysis, the trial judge must first conduct a threshold comparison of the crime committed to the sentence to be imposed in order to determine whether an inference of gross disproportionality arises. *Pool v. State*, 724 So. 2d 1044 (Ct. App. 1998).

The sentencing of a defendant under this section, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in § 97-3-7(2) was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. *Fleming v. State*, 604 So. 2d 280 (Miss. 1992).

Sentencing defendant to 15 years without possibility of parole, the maximum penalty for forgery, upon conviction for uttering a \$35 forged check, was not unconstitutionally disproportionate in violation of Federal Constitution's Eighth Amendment's cruel and unusual punishment clause, where sentence was imposed under habitual offender statute and defendant's 2 prior burglary convictions were not "truly non-violent" offenses; court noted that defendant's sentence was for 15 years, not life. *Burt v. Puckett*, 933 F.2d 350 (5th Cir. 1991).

A 15-year sentence without hope of parole, imposed upon a defendant as a habitual offender, for uttering a forged check in the amount of \$500, did not constitute cruel and unusual punishment. *Barnwell v. State*, 567 So. 2d 215 (Miss. 1990).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding this section, which requires habitual offenders to be sen-



tenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. *Clowers v. State*, 522 So. 2d 762 (Miss. 1988).

Sentence to 20 years' imprisonment without reduction, revocation or parole imposed upon defendant convicted of arson and of being habitual criminal is not unconstitutionally excessive where arson conviction is based upon defendant's having set occupied house on fire at both front and back doors and where defendant has prior convictions for burglary and uttering forgery. *Jenkins v. State*, 483 So. 2d 1330 (Miss. 1986).

Defendant was not deprived of his opportunity to be heard on the issue of prior convictions, where he had stipulated that he had been twice convicted of assault and the trial court based its enhanced sentence both on that stipulation and on certified copies of defendant's prior felony convictions; moreover, this section is not unconstitutional and a sentence of ten years for arson where the defendant had prior felony convictions for aggravated assault and assault with intent to commit murder did not violate the Eighth Amendment prohibition against cruel and unusual punishment. *King v. State*, 451 So. 2d 765 (Miss. 1984).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in *Solem v. Helm* (1983) 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (superseded by statute as stated in *Re Petition of Lauer* (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. *Davis v. State*, 510 So. 2d 794 (Miss. 1987).

## 6. Defendant's mistaken belief.

Defendant's guilty pleas were not "voluntarily" given and, thus, both pleas and

defendant's sentence would be vacated; although defendant, as habitual and subsequent offender, was familiar with criminal justice system, and he was advised by sources other than trial court that he was waiving right to jury trial, right to confront and cross-examine witnesses, and right against self-incrimination, no one, either in open court or in chambers, advised defendant that he could be sentenced to no less than 30-year mandatory sentence without parole, and there was justifiable basis for defendant to believe that, if he cooperated with narcotics task force by working as undercover informant, he could receive sentence of less than statutory minimum. *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

Defendant's motion for post-conviction relief was properly denied where he had no entitlement to a jury trial on the issue of whether or not he qualified for enhanced punishment under the habitual offender statute; defendant failed to prove that an intervening decision of the U.S. Supreme Court or the Mississippi Supreme Court excepted the procedural time bar of his claim pursuant to Miss. Code Ann. § 99-39-5(2). *Smith v. State*, — So. 2d —, 2007 Miss. App. LEXIS 39 (Miss. Ct. App. Feb. 6, 2007).

A circuit court's summary denial and dismissal of a defendant's motion for post-conviction collateral relief, under §§ 99-39-1 et seq., was not error where the defendant asserted that he entered a guilty plea under the advice and belief that the maximum sentence which could be imposed under the indictment was 20 years so that his 30-year sentence was improper, the maximum sentence which could be imposed under the indictment, which charged the defendant with possession of more than one kilogram of marijuana with intent to distribute and recidivism, was 30 years without parole or probation, and the transcript of the plea colloquy between the trial court judge and the defendant belied the defendant's claim of a 20-year plea bargain. *Turner v. State*, 590 So. 2d 871 (Miss. 1991).

An appellant who had entered a guilty plea to an escape charge almost 2 years before this section became effective, whose conviction for escape based on the



guilty plea, together with a 1974 robbery conviction, was used to enhance his sentence upon conviction of armed robbery in 1982, was not entitled to withdraw his guilty plea to the escape charge on the ground that, at the time of entering the guilty plea, he had not been informed by counsel or the court that his conviction, based on the guilty plea, could subsequently be used to enhance his punishment for future convictions. *Presley v. State*, 498 So. 2d 832 (Miss. 1986).

A defendant who enters a guilty plea to a felony charge, is not entitled as a matter of constitutional right, to information regarding the future use of his conviction based on the guilty plea for purposes of enhancement of punishment; it is not a consequence of his plea which he must be informed. *Presley v. State*, 498 So. 2d 832 (Miss. 1986).

#### **7. Sentencing trial or hearing, generally.**

When habitual offender status is alleged and the accused goes to trial, the trial court must hold a separate hearing without a jury to determine whether habitual offender status should be imposed. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).

A defendant who enters a plea of guilty is not entitled to a hearing separate from the guilty plea hearing on the question of whether he or she should be sentenced as a habitual offender. *Keyes v. State*, 549 So. 2d 949 (Miss. 1989).

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. *Monroe v. State*, 515 So. 2d 860 (Miss. 1987).

Habitual offender phase of trial was so infirm that it could not survive review where no two-phase trial actually occurred, because state did not reintroduce documents to prove prior convictions in sentencing phase of trial, the trial judge simply relying on it without its introduction. *Young v. State*, 507 So. 2d 48 (Miss. 1987).

At the bifurcated hearing required under the recidivist statutes, the state must prove, beyond a reasonable doubt, that the defendant meets the requirements for sentencing as a habitual offender. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

Circuit judge's inadvertent, offhand comment that he would continue recidivism hearing but that it "will have to be done this court term though" did not limit the judge's authority and preclude him from holding recidivism sentencing hearing while the court was in vacation, and while the judge was sitting in another county. *Miller v. State*, 492 So. 2d 978 (Miss. 1986).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. *Mhoun v. State*, 464 So. 2d 77 (Miss. 1985).

The requirement of this section of a bifurcated trial in prosecutions under that statute means a full two-phase trial prior to any finding that defendant is an habitual offender and subject to enhanced punishment; moreover, a complete record of the second part of the trial must be made. *Seely v. State*, 451 So. 2d 213 (Miss. 1984).

In a prosecution for aggravated assault the court properly refused to allow defendant a jury trial at the sentencing phase as an habitual criminal. *Hurt v. State*, 420 So. 2d 560 (Miss. 1982).

All cases tried involving this section are to be tried pursuant to [former] Rule 6.04 of the Mississippi Uniform Criminal Rules of Circuit Court Practice (1972); a defendant is not entitled to a jury trial on the issue of whether or not he is a habitual offender. The habitual offenders statute does not constitute cruel and inhuman treatment nor is the remoteness of the convictions relied upon for enhanced punishment to be considered as a factor. *Adams v. State*, 410 So. 2d 1332 (Miss. 1982).

#### **8. —When held.**

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the

sentencing process, insuring that excessive punishment shall not be inflicted. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

#### **9. —As constituting double jeopardy.**

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. *Hoover v. State*, 552 So. 2d 834 (Miss. 1989).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. *Ellis v. State*, 520 So. 2d 495 (Miss. 1988).

Neither this section nor § 99-19-83 violates constitutional prohibition against double jeopardy. *Perkins v. Cabana*, 794 F.2d 168 (5th Cir. 1986), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366 (1986).

Const. Art. 3 § 22, the Double Jeopardy Clause, precluded the state from having a second chance to establish defendant's habitual offender status under this section, where no evidence had been admitted to support such a conviction apart from evidence erroneously admitted by the trial court. *DeBussi v. State*, 453 So. 2d 1030 (Miss. 1984).

#### **10. Out of state convictions.**

Evidence of prior convictions in another state met the requirements of this section, even though the evidence contained references to a defendant with different middle initials, where the Department of Corrections serial number and the date of birth was the same throughout the records. *Handley v. State*, 574 So. 2d 671 (Miss. 1990).

Circuit court did not err in sentencing defendant as habitual offender, although

defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. *Buckley v. State*, 511 So. 2d 1354 (Miss. 1987).

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. *Moore v. State*, 508 So. 2d 666 (Miss. 1987).

In a prosecution for burglary the trial court properly considered a prior Kentucky conviction of escape from a Kentucky penitentiary as basis for enhancement of punishment pursuant to the habitual offender statute this section, where on its face the record of conviction indicated that defendant's plea of guilty therefor was voluntarily and knowingly made. *Phillips v. State*, 421 So. 2d 476 (Miss. 1982).

#### **11. Amendment of indictment.**

Amendment to indictment in order to sentence defendant as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81, was proper where, at trial, defendant did not contest or dispute the prior felony sentences introduced by the State at the hearing to amend the indictment. *Torrey v. State*, 891 So. 2d 188 (Miss. 2004).

State was permitted to amend its indictment charging defendant convicted of capital murder as a habitual offender despite the fact that the two previous felonies were not adjudicated at the time he was convicted of the third felony. It was clear that defendant committed two felonies before he was convicted of the capital murder; to find otherwise would go against the legislative intent of Miss.



Code Ann. § 99-19-81. *Willie v. State*, 876 So. 2d 278 (Miss. 2004).

When the State attempted to amend the indictment to allege that defendant was an habitual offender, defendant contended that this violated his constitutional right to be charged through an indictment by a grand jury; however, the State formally abandoned its motion to amend the indictment, and therefore, defendant was not subjected to enhanced punishment based on his prior criminal record. Also, the amendment to the indictment to allege the defendant's status as an habitual offender subject to enhanced punishment was not a substantive amendment requiring grand jury action, but could be allowed by the trial court on proper motion by the prosecution. *Owens v. State*, 869 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant did not err in allowing the State to amend an indictment charging defendant with murder to add an allegation that defendant was a habitual criminal; defendant was on notice of the State's intention to add habitual charges upon receipt of the needed documentation and the amendment neither surprised defendant nor prejudiced his defense. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

An amendment of an indictment which charged the defendant as a habitual offender under this section rather than § 99-19-83, which imposes a greater sentence than does this section, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).

Indictment charging defendant as habitual criminal under this section may be amended on date of trial, over objection of defendant, to charge indictment under § 99-19-83 where defense counsel has previously been advised that state intends to proceed under § 99-19-83 and defendant is fully aware during plea negotiations that state is taking this position; if defendant does not ask for continuance on basis of amendment, defendant may not later object on basis of surprise and prejudice in defense. *Ellis v. State*, 469 So. 2d 1256 (Miss. 1985).

## 12. Sentencing discretion.

Defendant's sentence after being convicted for possession of 73.7 grams of marijuana with intent to distribute as a habitual offender was proper pursuant to Miss. Code Ann. §§ 41-29-142(1) and 99-19-81 where the circuit court was required by statute to sentence him to 40 years' imprisonment without the possibility of parole and/or a \$60,000 fine, which is exactly what the circuit court did. *Foster v. State*, 928 So. 2d 873 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923 (Miss. 2006).

Reference to both Miss. Code Ann. §§ 99-19-81 and 41-29-147 in the indictment was sufficient to give defendant notice that he could be sentenced under either and gave him a fair opportunity to present a defense. It is not for the defendant to choose between two available sentencing options, both of which have been included in the charges against him. *Henderson v. State*, 878 So. 2d 246 (Miss. Ct. App. 2004).

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. Code Ann. §§ 41-29-147 and 99-19-81 where the trial court's opening remarks on voir dire did not constitute reversible error and defendant did not object at trial; further, defendant failed to establish ineffective assistance of counsel; counsel negotiated a plea that defendant refused and succeeded in having the trial court dismiss the portion of the indictment dealing with the sale occurring within 1,500 feet of a public park. *Easter v. State*, 878 So. 2d 10 (Miss. 2004).

At sentencing, once the trial judge had determined that at least two of defendant's prior felony convictions satisfied the requirements of Miss. Code Ann. § 99-19-81, the trial judge had no discretion in imposing the maximum 15-year term of imprisonment without eligibility for parole or probation for defendant's conviction for uttering a false check to a store. *Brown v. State*, 829 So. 2d 93 (Miss. 2002).

Sentencing under this section is not discretionary. If a defendant is a repeating offender falling within the provisions of this section, the trial judge has no alternative but to sentence the defendant un-



der that statute. *Harris v. State*, 527 So. 2d 647 (Miss. 1988); *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding this section, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. *Clowers v. State*, 522 So. 2d 762 (Miss. 1988).

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. *Monroe v. State*, 515 So. 2d 860 (Miss. 1987).

### 13. Proof of prior conviction or sentence.

Defendant's sentence as a habitual offender was appropriate because the introduction of original or certified copies of commitment papers was the common means to demonstrate prior convictions for purposes of enhanced sentencing as a habitual offender. *Turner v. State*, — So. 2d —, 2007 Miss. App. LEXIS 182 (Miss. Ct. App. Mar. 27, 2007).

In a case where defendant was convicted of kidnapping and simple assault, a trial court did not err by sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-81 because certified copies of his indictments and sentencing orders were competent evidence of his previous convictions; moreover, the trial court completed a bifurcated proceeding. *Williams v. State*, — So. 2d —, 2006 Miss. App. LEXIS 786 (Miss. Ct. App. Oct. 24, 2006).

Where defendant was indicted by the grand jury for armed robbery in violation of Miss. Code Ann. § 97-3-79, he was also indicted as a habitual offender having been convicted twice previously for felonies under Miss. Code Ann. § 99-19-81; the two prior felonies charged in the original indictment were grand larceny and bank robbery. *Wilson v. State*, 935 So. 2d 945 (Miss. 2006).

In a grand larceny case, the trial court did not err in finding defendant was an habitual offender as pen-packs showing

that he was sentenced to various prison terms provided sufficient evidence to show habitual status under Miss. Code Ann. § 99-19-81, and the State provided adequate notice under which statute they sought to proceed. *Frazier v. State*, 907 So. 2d 985 (Miss. Ct. App. 2005).

Evidence was sufficient under Miss. Code Ann. § 99-19-81 (2000) to support an habitual offender finding where the State introduced certified copies of three "pen packs," which were the records maintained on inmates sentenced to the custody of the Mississippi Department of Corrections and indicated defendant had had at least two prior felony convictions, and defendant's counsel indicated no objection to the admission of those pen packs. *Jasper v. State*, 858 So. 2d 149 (Miss. Ct. App. 2003), *aff'd, en banc*, 871 So. 2d 729 (Miss. 2004).

Plain error was found in defendant's enhanced sentencing as a habitual offender, where the criminal history report upon which the State and trial court relied did not appear in the record, and where there were no certified copies of any judgments of conviction, which are the best evidence of a conviction; in addition, the form of the amended indictment, insofar as the indictment purported to charge defendant as a habitual offender, was deficient, under Miss. Unif. Cir. & County Ct. Prac. R. 11.03(1), as the indictment did not fully acquaint defendant with the nature of the accusations. *Vince v. State*, 844 So. 2d 510 (Miss. Ct. App. 2003).

Two certified copies of commitment papers were sufficient evidence that the defendant was an habitual offender, notwithstanding the contention that the state failed to prove that the defendant was the same person named in those papers, where the defendant failed to introduce any evidence to rebut the presumption that he was the same person named in the papers and, therefore, the presumption arising from the identity of his name and the name in those papers was uncontested. *Fikes v. State*, 749 So. 2d 1107 (Miss. Ct. App. 1999).

At bifurcated hearing, as required under recidivist statutes, state must prove requirements set forth in habitual offender statute beyond reasonable doubt.

Davis v. State, 680 So. 2d 848 (Miss. 1996).

Evidence of prior convictions in another state met the requirements of this section, even though the evidence contained references to a defendant with different middle initials, where the Department of Corrections serial number and the date of birth was the same throughout the records. Handley v. State, 574 So. 2d 671 (Miss. 1990).

Certified copies of sentencing orders were proper proof of prior convictions, sufficient under habitual offender statute, where certification at issue contained attestation that copy was true and correct, and attestation bore seal of court; lack of book and page number were not fatal. Monroe v. State, 515 So. 2d 860 (Miss. 1987).

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to § 99-19-45 may be introduced in evidence as proof of such conviction; the absence of a limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. Pace v. State, 407 So. 2d 530 (Miss. 1981), overruled on other grounds, Hopson v. State, 625 So. 2d 395 (Miss. 1993).

#### 14. Particular circumstances.

Motion for post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine under Miss. Code Ann. § 41-29-139(a) since his 20-year sentence was not illegal; because he was a habitual offender, defendant should have actually received a mandatory 30-year sentence. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

Inmate's request for post-conviction relief was denied because Miss. Code Ann. § 99-19-81 (Rev. 2000) did not require that the underlying felonies be committed after the age of 21 or that the sentences imposed be served in a federal or state penitentiary. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

The trial court had jurisdiction to sentence the defendant as an habitual offender where the state offered two crimes

to support the defendant's habitual offender status, one of which was a previous conviction for robbery by use of deadly weapon, and the other a conviction for an unlawful transaction with a minor for which he was sentenced to five years, although the sentence was probated for five years subject to his continuing to meet certain conditions, therefore relieving him of the burden of incarceration. Anderson v. State, 766 So. 2d 133 (Miss. Ct. App. 2000).

Defendant's ex post facto rights were knowingly waived where there was testimony that defendant's attorneys indicated that defendant would waive any and all rights to effectuate the plea agreement for armed robbery as an habitual offender, and thus avoid a possible death sentence on a murder charge. Bell v. State, 751 So. 2d 1035 (Miss. 1999).

The defendant was properly sentenced as an habitual offender, notwithstanding that the indictment incorrectly stated the number of years to which he was sentenced on a prior conviction. Black v. State, 724 So. 2d 996 (Ct. App. 1998).

Habitual offender sentence imposed on defendant convicted of possession of cocaine with intent to deliver, requiring defendant to pay 30,000 fine and to serve 30 years without possibility of early parole, was not excessive and did not constitute cruel and unusual punishment: applicable sentencing statute allowed fines of 1,000 to 1 million and prison terms of up to 30 years. Sanders v. State, 678 So. 2d 663 (Miss. 1996).

Article 6, § 169 of the Mississippi Constitution was violated where language in an indictment charging the defendant as an habitual offender came after the words "against the peace and dignity of the state," since § 169 clearly states that a criminal indictment must "conclude" with those words; thus, the portion of the indictment charging the defendant as an habitual offender was fatally defective, and his sentence as an habitual offender would be reversed. McNeal v. State, 658 So. 2d 1345 (Miss. 1995).

In a prosecution for the sale of cocaine in violation of § 41-29-139, in which the defendant was convicted and sentenced as a habitual offender to 30 years' imprison-



ment, the evidence was sufficient to prove that the defendant was a habitual offender under this section where the defendant had previously pled guilty to the sale of less than one ounce of marijuana on 2 separate occasions for which he had received a 3-year suspended sentence and a one-year sentence, and certified copies of the indictments and sentencing orders in these prior cases were introduced into evidence at the sentencing hearing. *Moore v. State*, 631 So. 2d 805 (Miss. 1994).

Sentence of life imprisonment was required by this section because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. *Moore v. State*, 508 So. 2d 666 (Miss. 1987).

Absent a recommendation of the jury for a life sentence, imposition of such sentence on the defendant convicted of armed robbery, and sentenced as an habitual criminal, was error. *Watkins v. State*, 500 So. 2d 462 (Miss. 1987).

A defendant convicted of uttering a forgery, who was also indicted as, and proven to be, a recidivist, was properly sentenced to 15 years in prison pursuant to this section. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

Sentencing of defendant, who has entered plea of guilty to charge of capital murder, as habitual offender under this section, to serve life in prison without parole does not constitute unconstitutional cruel and unusual punishment. *Bridges v. State*, 482 So. 2d 1139 (Miss. 1986).

Defendant who had previously been convicted of 3 separate felonies, but whose only conviction for crime of violence is one for which he is currently under sentence, is not properly subject of life sentence as habitual offender. *Davis v. State*, 477 So. 2d 223 (Miss.-1985).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under this section. *Smith v. State*, 477 So. 2d 191 (Miss. 1985).

Imposition of 40 years' imprisonment under habitual offender statute (this section), which cannot be reduced or suspended and for which defendant cannot be eligible for probation or parole, upon conviction for armed robbery based on theft of meat during which defendant displayed pocket knife to avoid apprehension will be vacated, and additional sentence hearing and resentencing required, where adequate presentencing hearing was not held, even though trial judge afforded every opportunity to defendant and counsel to present mitigating evidence at that hearing. *Presley v. State*, 474 So. 2d 612 (Miss. 1985).

Defendant's argument, after being sentenced as a habitual offender to 15 years in prison without eligibility for probation or parole following his conviction for uttering a forged check, that the enhancement statute (this section) constituted an ex post facto law in violation of the United States Constitution, Art I, § 10, inasmuch as his prior convictions had occurred before the enhancement statute became effective, was without merit, where defendant's sentence as a habitual criminal was not to be viewed as either a new jeopardy or an additional penalty for his earlier crimes, but rather, as a stiffened penalty for his latest crime, which was an aggravated offense in that it was a repetitive one. *Smith v. State*, 465 So. 2d 999 (Miss. 1985).



In a prosecution for burglary, where defendant had been previously convicted of two separate felonies, the circuit judge did not err in sentencing defendant under this section, since the State's production of records indicating previous felonies furnished a presumption of identity which defendant could have easily overcome, had it been erroneous. *Course v. State*, 461 So. 2d 770 (Miss. 1984).

The trial court properly sentenced defendant convicted of burglary to a term of 10 years without eligibility for probation or parole, where defendant had twice previously been convicted of crimes. *Hall v. State*, 427 So. 2d 957 (Miss. 1983).

Although defendant, convicted of rape, was sentenced under the wrong habitual offender statute, remand for resentencing was not necessary, where the sentence imposed was in fact correct. *Taylor v. State*, 426 So. 2d 775 (Miss. 1983).

A defendant who had been sentenced to 40 years in prison for business burglary would have the sentence modified to delete the provision which stated "that sentence shall not be reduced or suspended nor shall you be eligible for parole or probation" where the indictment did not meet the requirements of the statute in that it did not state the court in which the defendant had been convicted, the date of the judgment, the nature or the description of the offense for which he had been convicted previously, or that he had been sentenced to serve one year or more in a state or federal prison. *Ard v. State*, 403 So. 2d 875 (Miss. 1981).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years

and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. *Woods v. State*, 393 So. 2d 1319 (Miss. 1981).

In a prosecution for the felonious sale of a controlled substance, defendant was properly sentenced as an habitual criminal where he had three prior burglary convictions and in each case had received a sentence of more than one year in a state penal institution, even though the last two convictions occurred after the date he had committed the offense in the present case. *Jordan v. State*, 383 So. 2d 495 (Miss. 1980).

In a prosecution for burglary, the trial properly sentenced defendant as a habitual offender, despite defendant's contention that the habitual offender statute only applied to those habitual offenders twice convicted of distinct felonies who had served sentences through actual incarceration; the statute is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of sentence. *Jackson v. State*, 381 So. 2d 1040 (Miss. 1980).

In a prosecution for burglary in which defendants were indicted as habitual offenders, the trial court did not commit reversible error in overruling one defendant's demurrer to the indictment, even though the indictment was fatally defective in its attempt to charge defendants as habitual offenders for its failure to set out the jurisdictions in which the previous convictions had been obtained, where the trial court acquitted that defendant of the habitual offender charge; as to the second defendant, who was found guilty on the habitual offender charge, the case against him would be remanded for resentencing as other than a habitual offender. Neither defendant was prejudiced by the habitual offender charge since no evidence of prior convictions was introduced in the trial on the principal charge. *Usry v. State*, 378 So. 2d 635 (Miss. 1979).

In a prosecution for uttering a forgery, the case would be remanded to determine

whether the maximum sentence had been improperly imposed pursuant to the habitual criminal statute, which was not part of the indictment, as required, or whether it had been properly imposed pursuant to the general sentencing statute for this crime. *Bell v. State*, 355 So. 2d 1106 (Miss. 1978).

### 15. Sentence not excessive.

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he failed to request a bifurcated hearing on his habitual offender status; even if the error had been preserved, a hearing was not required because he entered a guilty plea to the principal charge. *Rucker v. State*, 955 So. 2d 958 (Miss. Ct. App. 2007).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, in admitting his prior felony convictions after analyzing them under Miss. R. Evid. 403 they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. *Carter v. State*, 953 So. 2d 224 (Miss. 2007).

Defendant's sentences of 30 years and 25 years in prison for his convictions of rape and burglary of a dwelling, to be served consecutively, did not constitute cruel and unusual punishment because the trial court imposed sentences within the statutory limits for the crimes, and a threshold comparison of defendant's sentence with his crimes did not raise an inference of gross disproportionality that would trigger the Solem proportionality analysis. *Magee v. State*, — So. 2d —, 2007 Miss. App. LEXIS 120 (Miss. Ct. App. Mar. 6, 2007).

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83, was of little or no effect. *Clark v. State*, —

So. 2d —, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. Nov. 7, 2006).

Defendant was indicted and sentenced as a subsequent offender under Miss. Code Ann. § 41-29-147 and as a habitual offender under Miss. Code Ann. § 99-19-81 for the crime of sale of a controlled substance; drug sentences were distinguished from sentences for crimes that required a judge to impose a sentence reasonably expected to be less than life in the absence of a jury recommending a life sentence. *Hudderson v. State*, 941 So. 2d 221 (Miss. Ct. App. 2006).

Three different statutory enhancements were properly used in sentencing defendant to 32 years' imprisonment for cocaine possession while possessing a firearm and firearm possession by a convicted felon; because he had been twice previously convicted of felonies, and sentenced to separate terms of at least one year, the maximum base term of imprisonment for possession, eight years under Miss. Code Ann. § 41-29-139(c)(1)(B), Miss. Code Ann. § 99-19-81, applied; because he also possessed a firearm, that sentence was doubled to 16 years, and because he had been previously convicted of a drug offense, the trial judge doubled the sentence again to arrive at a 32-year sentence. *Mosley v. State*, 930 So. 2d 459 (Miss. Ct. App. 2006).

In a case where defendant was convicted of two counts of possession with intent to distribute and sentenced as an habitual offender, because the trial judge could consider societal concerns during sentencing, and because the judge did not exceed the maximum penalties, the trial judge did not err in sentencing defendant to 30 years for each count. *Cannon v. State*, 918 So. 2d 734 (Miss. Ct. App. 2005).

Defendant's effective sentence of 60 years without parole for a drug offense where none of his prior convictions involved crimes of violence was within the statutory guidelines prescribed by the legislature under Miss. Code Ann. §§ 41-29-147 and 99-19-81; additionally, although harsh, defendant's sentence was not grossly disproportionate to his crime. It was within the legislature's prerogative to determine that three crimes such as those



committed by defendant could result in a sentence of 60 years without parole or chance of early release; thus, defendant's sentence did not violate the federal or state constitutional prohibitions of cruel and unusual punishment. *Tate v. State*, 912 So. 2d 919 (Miss. 2005).

Where defendant was sentenced to consecutive sentences of 60 years for the sale of cocaine and 32 years for the possession of a certain quantity of cocaine, the sentences were within the limits of those set out by the Mississippi Legislature and, under the circumstances of the case, where defendant fit plainly within the category of repeat drug offender, since all his convictions shown in the record related to narcotic possession or narcotic trafficking, the sentences were not so unreasonably harsh as to invoke constitutional considerations of cruel and unusual punishment. *Wright v. State*, 863 So. 2d 1005 (Miss. Ct. App. 2004).

#### 15.5. Unadjudicated offenses.

Defendant who has been convicted of one violent crime at the time he is sen-

tenced for a second crime of violence clearly comes within the purviews of Miss. Code Ann. § 99-19-81, even though his sentence for the first conviction is not adjudged until after the second is committed. *Willie v. State*, 876 So. 2d 278 (Miss. 2004).

#### 16. Appeal of cause, ineffectiveness of counsel.

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. Code Ann. §§ 41-29-147 and 99-19-81 where the trial court's opening remarks on voir dire did not constitute reversible error and defendant did not object at trial; further, defendant failed to establish ineffective assistance of counsel; counsel negotiated a plea that defendant refused and succeeded in having the trial court dismiss the portion of the indictment dealing with the sale occurring within 1,500 feet of a public park. *Easter v. State*, 878 So. 2d 10 (Miss. 2004).

**Cited in:** *Hughery v. State*, 915 So. 2d 457 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2005).

### RESEARCH REFERENCES

**ALR.** What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 A.L.R.2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 A.L.R.2d 870.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 A.L.R.2d 227.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 24 A.L.R.2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 A.L.R.2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal. 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 A.L.R.2d 1196.

Conviction under Dyer Act (18 USCS §§ 2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes. 65 A.L.R.3d 586.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Validity and construction of statute or ordinance mandating imprisonment for habitual or repeated traffic offender. 2 A.L.R.4th 618.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 A.L.R.5th 263.

Vulnerability of victim as aggravating factor under state sentencing guidelines. 73 A.L.R.5th 383.

Pardoned or expunged conviction as "prior offense" under state statute or reg-



ulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 A.L.R. Fed. 110.

**Am Jur.** 39 Am. Jur. 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2340, 2341 et seq.

**Law Reviews.** 1981 Mississippi Su-

preme Court Review: Criminal Law and Procedure. 52 Miss. L. J. 427, June, 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss L. J. 149, March, 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss L. J. 162, March, 1983.

## § 99-19-83. Sentencing of habitual criminals to life imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

**SOURCES:** Laws, 1976, ch. 470, § 2, eff from and after January 1, 1977.

**Cross References** — Inmate convicted as habitual offender ineligible for earned time allowance on sentence, see § 47-5-139.

Ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

Sentencing of habitual criminals to maximum term of imprisonment, see § 99-19-81.

### JUDICIAL DECISIONS

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#### 1. In general.

When defendant was sentenced to a life sentence as a habitual offender following his conviction for possession of cocaine, the sentence was not unconstitutional because the state properly amended defendant's indictment, and defendant was made aware that if he were to be found guilty he would be sentenced as a habitual offender. *Williams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 73 (Miss. Ct. App. Feb. 20, 2007).

Defendant argued that the sentence of 15 years' imprisonment was illegal, as he was previously convicted of a violent crime, thus making him ineligible for a sentence any less than life imprisonment, pursuant to Miss. Code Ann. § 99-19-83;

however, this argument was without merit where he actually benefitted from the sentence by receiving 15 years' imprisonment, rather than life imprisonment, and his motion for post-conviction relief failed as it was procedurally barred by Miss. Code Ann. § 99-39-27(9) and time barred by Miss. Code Ann. § 99-39-5(2). *Cook v. State*, 910 So. 2d 745 (Miss. Ct. App. 2005).

While the life sentence defendant received under the habitual offender statute, Miss. Code Ann. § 99-19-83(3), was indeed harsh for the robbery offense he committed, the Mississippi Legislature had determined that the sentence defendant received was a proper sentence for a habitual offender. All the requirements for § 99-19-83(3) had been met and it was not up to the court to change the sentencing scheme because that responsibility was exclusively within the province of the Legislature. *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

As an inmate had two prior felony convictions, one of which was for aggravated assault, he could have been indicted as an habitual offender under Miss. Code Ann. § 99-19-83; therefore, his counsel did not provide ineffective assistance by warning him that this would occur unless he pled guilty. *Hearvey v. State*, 887 So. 2d 836 (Miss. Ct. App. 2004).

Defendant was handed his sentence of life imprisonment without parole because he was a recidivist who committed the felony of uttering a forgery; defendant's sentence was justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. *Miles v. State*, 864 So. 2d 963 (Miss. Ct. App. 2003).

A defendant who enters a plea of guilty is not entitled to a hearing separate from the guilty plea hearing on the question of whether he or she should be sentenced as a habitual offender. *Keyes v. State*, 549 So. 2d 949 (Miss. 1989).

Concurrent sentences for separate convictions meet the requirements of the habitual offender statute as "separate terms served." *Magee v. State*, 542 So. 2d 228 (Miss. 1989).

Robbery is a crime of violence within the meaning of the habitual offender statute. *Magee v. State*, 542 So. 2d 228 (Miss. 1989).

The crime of attempted robbery is a crime of violence within the meaning of this section. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

The admission of evidence of a third conviction at a sentencing hearing in addition to those set out in the indictment was harmless error since, under the habitual offender statute (this section), proof of 2 convictions is sufficient to imprison a defendant for life, and the trial judge has no discretion in the sentencing phase. *Jimpson v. State*, 532 So. 2d 985 (Miss. 1988).

Serving one year or more on concurrent sentences for separate convictions amounts to serving more than one year on each sentence for purposes of the habitual offender statute (this section), which provides for sentencing of a recidivist "who shall have been sentenced and served separate terms of one (1) year or more." *King v. State*, 527 So. 2d 641 (Miss. 1988).

Armed robbery is a crime of violence, per se, for purposes of sentencing as an habitual offender under this section. *King v. State*, 527 So. 2d 641 (Miss. 1988).

Time served in a local or county jail is the equivalent of time spent in a state or federal penal institution under the habitual offender statute (this section), which sets forth sentencing for "habitual criminals" who have been sentenced to and have served separate terms of one year or more "in any state and/or federal penal institution." *Huntley v. State*, 524 So. 2d 572 (Miss. 1988).

Indictment of defendant as habitual offender should contain allegation that 2 separate penal terms of one year or more have actually been served. *Hentz v. State*, 510 So. 2d 515 (Miss. 1987).

While it is not always necessary for the indictment to recite the statute number under which a defendant is being charged, the better practice is to include it, and this especially so in habitual offender cases where the state may proceed under one of 2 statutes. *Martin v. State*, 501 So. 2d 1124 (Miss. 1987).

In absence of legislative standard for determining "crime of violence," a sepa-

rate standard of determining violence applies when the victim is a child, and, thus, one of the 2 prior offenses of defendant, assault with attempt to commit sodomy, was a crime that was violent per se, and defendant was subject to sentencing as a habitual offender. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

The term "violent crime" or "crime of violence" need not be explicitly set out in a indictment under this section, so long as one of the prior offenses named therein is recognized as a violent crime. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

Phrase "crime of violence" is not unconstitutionally vague as applied in habitual offender prosecution of defendant who has previously been convicted of rape. *McQueen v. State*, 473 So. 2d 971 (Miss. 1985).

The statute contemplates that the trial court without a jury should hear evidence and make a determination of whether the defendant has been previously convicted under the statute, with the burden resting upon the state to prove the previous convictions beyond a reasonable doubt; however, it is not necessary that the issue of prior convictions be submitted to a jury. *Wilson v. State*, 395 So. 2d 957 (Miss. 1981).

## 2. Double jeopardy.

The prohibition against double jeopardy did not preclude the State at resentencing from enhancing a defendant's life sentence for murder with the habitual offender statute where the defendant was initially sentenced to death and therefore his status as an habitual offender was not determined until after the sentencing trial on remand; since the defendant's status as an habitual offender had not previously been determined, the finding of habitual offender status on resentencing was not barred by double jeopardy. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. *Ellis v. State*, 520 So. 2d 495 (Miss. 1988).

Neither § 99-19-81 nor this section violates constitutional prohibition against double jeopardy. *Perkins v. Cabana*, 794 F.2d 168 (5th Cir. 1986), cert. denied, 479

U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366 (1986).

## 3. Sentencing trial or hearing, generally.

Prior convictions were a recognized exception to the requirement of a jury determination of enhancing sentencing factors, and accordingly it was not necessary that a jury determine whether the inmate qualified for enhanced sentencing as a habitual offender under Miss. Code Ann. § 99-19-83; thus, the trial court did not err when it did not empanel a jury for that purpose. *Issac v. State*, — So. 2d —, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. May 29, 2007).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Admission of evidence in habitual offender capital murder case that defendant's habitual offender status makes him ineligible for parole is founded upon theory that Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factors, aspects of defendant's character or record proffered as a basis for sentence less than death. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

When habitual offender status is alleged and the accused goes to trial, the trial court must hold a separate hearing without a jury to determine whether habitual offender status should be imposed. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).



An accused has no constitutional right to a trial by jury on the question of whether he or she is a habitual offender. All that is required is that the accused be properly indicted as a habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof. *Keyes v. State*, 549 So. 2d 949 (Miss. 1989).

While the defendant has a right to be heard at the bifurcated hearing required under the recidivist statutes, where he takes the stand and admits the prior convictions, which are valid on their face, he will not then be heard to challenge the constitutionality of his prior convictions. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

At the bifurcated hearing required under the recidivist statutes, the state must prove, beyond a reasonable doubt, that the defendant meets the requirements for sentencing as a habitual offender. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. *Mhoon v. State*, 464 So. 2d 77 (Miss. 1985).

#### 4. —When held.

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

#### 5. Indictment.

Record showed that well before defendant's August 2005 trial he was served with notice of the state's motion to amend the indictment to charge him as a habitual offender under Miss. Code Ann. § 99-

19-83; there was no indication in the record that defendant was unfairly surprised or prejudiced by the amendment, and therefore defendant did not show error in amending the indictment pursuant to Miss. Unif. Cir. & Cty. R. 7.09. *Evans v. State*, 957 So. 2d 430 (Miss. Ct. App. 2007).

Amendment of an indictment on the day of trial to charge defendant as a habitual offender was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 and Miss. Code Ann. § 99-19-83 because defense counsel had notice of the state's intentions, and defendant was given additional time to consult with his attorney about a plea agreement. *Jackson v. State*, 943 So. 2d 746 (Miss. Ct. App. 2006).

It was permissible to amend the indictment on the date of trial and to charge defendant as a habitual criminal under Miss. Code Ann. § 99-19-83, because defendant was clearly aware of the State's intention to amend the indictment and of the penalty which the amendment would carry, and because his defense was not prejudiced by the amendment. *Forkner v. State*, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

An indictment is not required to specifically state that the state will seek a life sentence without benefit of parole; an allegation that the defendant is a habitual criminal pursuant to this section is sufficient. *Ficklin v. State*, 758 So. 2d 457 (Miss. Ct. App. 2000).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than this section, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. *Nathan v. State*, 552 So. 2d 99 (Miss. 1989).

Indictment, to be valid under this section, must inform the defendant that the state is seeking to impose a life sentence without eligibility for parole or probation. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

An indictment which specified the principal charge against the defendant, a vio-

lation of § 97-5-23, and went on to cite with specificity the other 2 previous convictions against him, without ever informing him that the state sought to sentence him as a habitual offender under this section, was inadequate, but the inadequacy of the indictment did not require reversal where the defendant had notice of the habitual offender charge, because his attorney had gleaned from the indictment that defendant was charged under this section. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

Indictment charging defendant as habitual criminal under § 99-19-81 may be amended on date of trial, over objection of defendant, to charge indictment under this section where defense counsel has previously been advised that state intends to proceed under this section and defendant is fully aware during plea negotiations that state is taking this position; if defendant does not ask for continuance on basis of amendment, defendant may not later object on basis of surprise and prejudice in defense. *Ellis v. State*, 469 So. 2d 1256 (Miss. 1985).

An indictment which set forth substantive crime and the habitual criminal requirements in clear and unambiguous language was sufficient to apprise defendant that the state was seeking to impose a life sentence without eligibility for parole or probation, even though it did not include the habitual offender section number; moreover, the trial court conducted a proper sentencing hearing pursuant to this section, prior to imposing sentence on defendant, where, after return of the jury verdict, the district attorney introduced evidence of certified copies of the previous convictions, the trial judge thereupon specifically asked defendant's attorney if he had anything to say, the attorney responded in the negative, the court then inquired of defendant whether he had anything to say, and he stated that he did not, and no additional hearing was requested, in that these actions constituted at the least a waiver of defendant's right to proceed and introduce evidence on his behalf in the sentencing phase. *Dalgo v. State*, 435 So. 2d 628 (Miss. 1983).

No reversible error was committed by the trial court in permitting the state to

amend an indictment prior to starting the sentencing hearing after the jury's verdict of guilty where the indictment had erroneously set forth the dates of the defendant's two prior convictions in North Carolina and where no prejudice to the defendant resulted from the amendment. *McLamb v. State*, 410 So. 2d 1318 (Miss. 1982).

The effect of double enhancement where the crime of carrying a concealed weapon after conviction of a felony is combined with sentencing under the habitual offenders statute does not render the latter statute unconstitutional. Failure of the state to specify in an indictment which section of the habitual criminal statute, § 99-19-81 or this section, applies to a defendant is not error since the statutes are not criminal offenses and only affect sentencing. *Osborne v. State*, 404 So. 2d 545 (Miss. 1981).

In a prosecution for burglary as an habitual offender, the indictment properly complied with the statute where it alleged with particularity the nature and description of the offenses constituting the previous felonies committed by the defendant, and listed the state jurisdictions of the previous convictions and the dates of those judgments. The defendant was not entitled to a jury trial on the issue of his previous felonies; nor does the statute constitute cruel and unusual punishment. *Diddlemeyer v. State*, 398 So. 2d 1343 (Miss. 1981).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under this section, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under § 99-17-3 was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; this section does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March



14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. *Yates v. State*, 396 So. 2d 629 (Miss. 1981).

### 6. Right to speedy trial.

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

### 7. Constitutionality.

Defendant's argument that because of its prescribed sentence of life imprisonment without parole, the habitual offender statute, Miss. Code Ann. § 99-19-83, was violative of his Eighth Amendment right failed because § 99-19-83 was found not to violate one's Eighth Amendment rights and the length of sentences was properly controlled by the Legislature. *Forkner v. State*, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Sentence of life imprisonment without parole was not unconstitutionally disproportionate for defendant sentenced as habitual offender on record of convictions for burglary, armed robbery, and prison escape, and was not cruel and unusual punishment under Eighth Amendment. Even though final conviction was for auto burglary, a concededly less offense than earlier offenses, earlier record was of convictions for armed robbery, burglary, escape, and armed robbery, at least two of which were crimes of violence per se. *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992), cert. denied, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992).

A defendant's life imprisonment under the recidivist statute, this section, after he shoplifted and ate 2 cans of sardines in a store, and then attempted to steal the money to pay for them by breaking into a house, was unduly harsh under an Eighth Amendment cruel and unusual punish-

ment analysis. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

The application of § 99-19-81 to recidivist murderers, rapists and kidnappers does not violate the Fourteenth Amendment of the United States Constitution even though under the habitual offender statutes, this section and § 99-19-81, taken together, only those convicted of murder, rape or kidnapping can be sentenced to life without parole without proof of a prior conviction of a crime of violence. *Sutherland v. State*, 537 So. 2d 1360 (Miss. 1989).

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions—one for assault with intent to commit sodomy and the other for indecency with a child—did not constitute cruel and unusual punishment. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

### 8. Appeals by State.

There was no statutory authority for an appeal by the State from a circuit court based upon the circuit judge's failure to sentence a defendant to life without parole following his conviction of burglary and proof that he was an habitual offender under this section, and therefore the appeal would be dismissed for lack of jurisdiction. *State v. Lee*, 602 So. 2d 833 (Miss. 1992).

### 9. Habitual offender portion of indictment.

Where the prosecution stated that if the inmate refused its latest plea deal it would amend the indictment to allege that he was a habitual offender under Miss. Code Ann. § 99-19-83, the inmate did not take the plea offer, and the prosecution then filed the motion to amend the indictment; thus, the inmate was clearly aware of the habitual offender allegation prior to his guilty plea not only to aggravated assault, but also to his habitual offender status. *Issac v. State*, — So. 2d —, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. May 29, 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S.



Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. *Kelly v. State*, 947 So. 2d 1002 (Miss. Ct. App. 2006).

Defendant charged with robbery had been convicted previously for grand larceny and bank robbery; the trial court did not err in amending the indictment to charge defendant as a habitual offender under Miss. Code Ann. § 99-19-83, and defendant was sentenced to a term of life without parole. *Wilson v. State*, 935 So. 2d 945 (Miss. 2006).

Defendant was properly sentenced as a habitual offender because a previous manslaughter conviction was considered a crime of violence for purposes of Miss. Code Ann. § 99-19-83. *Koger v. State*, 919 So. 2d 1058 (Miss. Ct. App. 2005).

Defendant failed to preserve his claim that the trial court had erred in failing to quash the habitual offender portion of the indictment because it was missing the concluding language required by Miss. Const. Art. VI, § 169, that stated "against the peace and dignity of the state." *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Where the record indicated that both defendants had been convicted twice previously of felonies, at least one of which had been a crime of violence, and such proof, in permissible form, was adduced at trial, the trial court did not err in sentencing defendants as habitual offenders. *Harper v. State*, 887 So. 2d 817 (Miss. Ct. App. 2004).

The habitual offender portion of an indictment which was returned under this section was faulty in that it did not give the date of the judgment for a prior conviction and, therefore, the conviction should not have been allowed to be used in the habitual sentencing portion of the trial. *Ormond v. State*, 599 So. 2d 951 (Miss. 1992).

#### 10. Proof of prior conviction; in Mississippi.

State sufficiently established that defendant had previously served two separate terms of one year or more in state or federal penal institution, as would bring

defendant within scope of habitual offender sentencing statute, where defendant's parole officer testified that defendant had been incarcerated for over a year for assault of police officer and that defendant had been incarcerated for over a year for separate grand larceny conviction. *Davis v. State*, 680 So. 2d 848 (Miss. 1996).

At bifurcated hearing, as required under recidivist statutes, state must prove requirements set forth in habitual offender statute beyond reasonable doubt. *Davis v. State*, 680 So. 2d 848 (Miss. 1996).

The State would not be permitted a second chance to prove the habitual offender status of a defendant where the habitual offender portion of the sentence had been vacated due to the insufficiency of the evidence presented to prove the necessary prior convictions; Article 3, § 22 of the Mississippi Constitution would bar the State from perfecting its evidence through successive attempts. *Cox v. State*, 586 So. 2d 761 (Miss. 1991).

Certified copies of a defendant's commitment papers were competent evidence of previous convictions for purposes of proving that the defendant was a habitual offender under this section. *Estelle v. State*, 558 So. 2d 843 (Miss. 1990).

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to § 99-19-45 may be introduced in evidence as proof of such conviction; the absence of a limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. *Pace v. State*, 407 So. 2d 530 (Miss. 1981), overruled on other grounds, *Hopson v. State*, 625 So. 2d 395 (Miss. 1993).

#### 11. —Out of state.

Out-of-state exhibits were not admissible evidence of a prior conviction for the purpose of sentencing the defendant as a habitual offender under this section, where the exhibits consisted of a letter from a correction records supervisor and police records detailing a prior arrest and conviction which were only notarized and

were therefore not properly certified, and file copies from the Florida Department of Corrections which were copies of copies rather than certified copies of a public record. *Cox v. State*, 586 So. 2d 761 (Miss. 1991).

## 12. Jury instructions.

At sentencing phase in capital murder case, jury is entitled to know by instruction whether defendant is eligible for parole, as that information is nonspeculative and provides jurors with relevant information to determine defendant's fate. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In a prosecution for aggravated assault on an indictment charging defendant with being a habitual criminal, the trial court's failure to give a limiting instruction on its own motion informing the jury not to consider defendant's prior convictions as evidence of the assault charges did not deny him due process of law, where defendant had testified freely as to the offenses made part of the indictment and where no limiting instruction was requested by defendant's counsel; under the totality of the circumstances, such an instruction was not constitutionally required. *Nettles v. State*, 380 So. 2d 246 (Miss. 1980).

## 13. Validity of guilty plea.

Where defendant was convicted of grand larceny and had prior convictions for attempted rape and manslaughter, defendant's sentence of life imprisonment without the possibility of parole was not grossly disproportionate. Moreover, the documents offered by the State regarding said prior convictions did only refer to defendant's first and last name, but in testimony a parole officer and the State

referred to defendant with all three names; the record did not reflect that defendant objected and no error, if any, was preserved or appeal. *Clay v. State*, 881 So. 2d 354 (Miss. Ct. App. 2004).

A defendant's argument that his previous guilty pleas did not "on their face show that they were knowing and voluntary," as required for purposes of proving that the defendant was a habitual offender, was without merit where the defendant did not dispute the prior convictions as having been given involuntarily even though the lower court specifically asked him whether he wished to do so; the burden was on the defendant to introduce evidence to make a prima facie case showing that his guilty pleas were constitutionally invalid. *Estelle v. State*, 558 So. 2d 843 (Miss. 1990).

## 14. Particular circumstances.

Where the trial court began to sentence the inmate to a 20-year sentence for aggravated assault, but the prosecutor notified the trial court that the inmate was being sentenced as a habitual offender pursuant to Miss. Code Ann. § 99-19-83, the trial court then read the statute and sentenced the inmate to life imprisonment; the trial court imposed a 20-year sentence, corrected itself, sentenced the inmate to life imprisonment, and then adjourned, and thus the trial court did not impermissibly impose a definite sentence and then illegally impose a greater sentence. *Issac v. State*, — So. 2d —, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. May 29, 2007).

Trial court had not improperly determined facts giving rise to a defendant's lifetime habitual status where the post-jury verdict hearing was relegated to proof regarding prior convictions for four separate felonies to which the defendant had pled guilty. *Garrison v. State*, 950 So. 2d 990 (Miss. 2006).

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83,



was of little or no effect. *Clark v. State*, — So. 2d —, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. Nov. 7, 2006).

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where he attempted to burn the structure; further, his sentence as an habitual offender pursuant to Miss. Code Ann. § 99-19-83 was proper because the fact that the sentences were served concurrently for his Tennessee convictions did not erase the fact that he was given two separate sentences. *Holbrook v. State*, 877 So. 2d 525 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1340, 161 L. Ed. 2d 141 (2005).

The defendant was properly sentenced as an habitual offender where he had been convicted previously of the crimes of possession of cocaine and aggravated assault, the charges for these two crimes were brought separately, and the defendant served separate terms of more than one year in prison for these crimes. *Tran v. State*, 785 So. 2d 1112 (Miss. Ct. App. 2001).

Defendant's time served in county jail was equivalent to time served in state penitentiary under habitual offender sentencing statute. *Davis v. State*, 680 So. 2d 848 (Miss. 1996).

Defendant's prior conviction for aggravated assault of law enforcement officer was conviction for "crime of violence" within meaning of habitual offender sentencing statute. *Davis v. State*, 680 So. 2d 848 (Miss. 1996).

A defendant's conviction for escape under § 97-9-45 constituted a "felony" and, therefore, he was properly sentenced as a habitual offender under this section. *Beckham v. State*, 556 So. 2d 342 (Miss. 1990).

Reindictment of defendant as habitual offender was not the result of prosecutorial vindictiveness after defendant rejected plea bargaining offer. *Graves v. State*, 492 So. 2d 562 (Miss. 1986).

A defendant was entitled to have his sentence as a habitual offender under this section vacated, where the state at the trial proved that he had 2 felony convictions, but failed to prove that he had

actually served one year or more on such convictions. The state's proof would only have sustained a conviction under Mississippi Code § 99-19-81. *Ellis v. State*, 485 So. 2d 1062 (Miss. 1986).

Sentence of life imprisonment without parole as violent habitual offender imposed upon defendant convicted of burglary of occupied house who has previously been convicted of mayhem and manslaughter is not disproportionate to crime and does not violate Eighth Amendment to United States Constitution. *Jackson v. State*, 483 So. 2d 1353 (Miss. 1986), cert. denied, 522 U.S. 1119, 118 S. Ct. 1059, 140 L. Ed. 2d 120 (1998).

Convicted defendant who has been convicted twice previously of felonies which were brought and arose out of separate incidents at different times and was sentenced to and did serve one or more years on each offense, at least one of which was crime of violence, may be sentenced as violent habitual offender even though prior sentences were served consecutively without intervening period in which defendant was free of confinement. *Jackson v. State*, 483 So. 2d 1353 (Miss. 1986), cert. denied, 522 U.S. 1119, 118 S. Ct. 1059, 140 L. Ed. 2d 120 (1998).

Defendant who had previously been convicted of 3 separate felonies, but whose only conviction for crime of violence is one for which he is currently under sentence, is not properly subject of life sentence as habitual offender. *Davis v. State*, 477 So. 2d 223 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under this section is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under § 99-19-81. *Smith v. State*, 477 So. 2d 191 (Miss. 1985).

In order to be sentenced under this section, an individual must have committed two prior felonies, one of which was violent, and have been sentenced and served terms of at least one year on each



of those prior felonies; accordingly, where a petitioner convicted of armed robbery had two prior convictions for breaking and entering and larceny, the appellate court would be compelled to grant his motion for leave to file motion to vacate habitual criminal sentence in forma pauperis. *McLamb v. State*, 456 So. 2d 743 (Miss. 1984).

Although defendant, convicted of rape, was sentenced under the wrong habitual offender statute, remand for resentencing was not necessary, where the sentence imposed was in fact correct. *Taylor v. State*, 426 So. 2d 775 (Miss. 1983).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under this section, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under § 99-17-3 was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; this section does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. *Yates v. State*, 396 So. 2d 629 (Miss. 1981).

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. *Baker v. State*, 394 So. 2d 1376 (Miss. 1981).

In a prosecution for armed robbery, the trial court did not err in admitting during the state's case in chief evidence of prior convictions pursuant to this section, even though [former] Criminal Rule of Circuit Court Practice Rule 6.04 prohibits mentioning prior convictions except for im-

peachment, where the trial antedated the court rule, where the indictment was laid under the habitual criminal statute, and where a cautionary instruction was given to the jury regarding the prohibition against using prior convictions as substantive evidence of the cardinal charge. *Davis v. State*, 377 So. 2d 1076 (Miss. 1979).

### 15. Time served.

In a prior case, the inmate was sentenced to a 10-year sentence with five years to serve and five years on post-release supervision for aggravated assault and possession of a firearm by a convicted felon, and in another prior case he was sentenced to three years for an unlawful possession of cocaine charge; thus, the evidence was sufficient to find that he was a habitual offender and to sentence him to life imprisonment under Miss. Code Ann. § 99-19-83. *Issac v. State*, — So. 2d —, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. May 29, 2007).

Defendant's service of more than one year of a concurrent 20-year sentence, in conjunction with his five prior felony convictions, was sufficient to meet the requirements of Miss. Code Ann. § 99-19-83 and sentence him as a habitual offender. *Otis v. State*, 853 So. 2d 856 (Miss. Ct. App. 2003).

The time span to be considered for the purpose of determining "time served" under this section runs from the time the defendant is incarcerated on the second, predicate felony offense, including pre-trial incarceration, until the date on which the indictment on the third, habitual felony offense is returned. *Feazell v. State*, 761 So. 2d 140 (Miss. 2000).

### 16. Effective assistance of counsel.

Defendant's sentence as a habitual offender pursuant to Miss. Code Ann. § 99-18-83 was proper where his counsel was not ineffective for a failure to object because the certified copy of defendant's conviction and the testimony provided proved that he was convicted of a crime in Louisiana and that he served a term of more than one year. *Holloway v. State*, 914 So. 2d 817 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**ALR.** What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 A.L.R.2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 A.L.R.2d 870.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 A.L.R.2d 227.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 24 A.L.R.2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 A.L.R.2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal. 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 A.L.R.2d 1196.

Conviction under Dyer Act (18 USCS §§ 2312, 2313) as ground for enhance-

ment of penalty under state habitual criminal statutes. 65 A.L.R.3d 586.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 A.L.R.5th 263.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 A.L.R. Fed. 110.

**Am Jur.** 39 Am. Jur. 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2289, 2290, 2294, 2295 et seq.

**Law Reviews.** 1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss. L. J. 427, June, 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March, 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March, 1983.

## § 99-19-84. Electronic monitoring as condition of probation for offense requiring registration as a sex offender; rules and regulations.

Whenever probation is a part of a sentence prescribed for an offense for which registration as a sex offender is required under Title 45, Chapter 33, the court may include as a condition of probation that the sex offender be placed on electronic monitoring. The Department of Corrections shall promulgate rules and regulations for the implementation of electronic monitoring of sex offenders on probation.

**SOURCES:** Laws, 2006, ch. 566, § 1, eff from and after July 1, 2007.

## § 99-19-85. Governor's pardoning power unaffected.

Nothing in Sections 99-19-81 through 99-19-87 shall be construed or considered as seeking or tending to impair the pardoning power or other

powers reserved to the Governor under Section 124 of the Mississippi Constitution of 1890.

**SOURCES:** Laws, 1976, ch. 470, § 3, eff from and after January 1, 1977.

**Editor's Note** — Section 124 of the Mississippi Constitution referred to in this section, is codified as Miss. Const. Art. 5, § 124.

## § 99-19-87. Punishment by death unaffected.

Nothing in Sections 99-19-81 through 99-19-87 shall abrogate or affect punishment by death in any and all crimes now or hereafter punishable by death.

**SOURCES:** Laws, 1976, ch. 470, § 4, eff from and after January 1, 1977.

### SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

SEC.

- 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.
- 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment.
- 99-19-105. Review by State Supreme Court of imposition of death penalty.
- 99-19-106. Date of execution of death sentence.
- 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

## § 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in



violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit,

or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, Mississippi Code of 1972, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

**SOURCES:** Laws, 1977, ch. 458, § 2; Laws, 1983, ch. 429, § 2; Laws, 1994, ch. 566, § 1, eff from and after July 1, 1994.

**Editor's Note** — Laws of 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

**Cross References** — Homicide, murder, capital murder defined, see § 97-3-19.

Penalty for murder or capital murder, see § 97-3-21.

Review by Supreme Court of imposition of death penalty, see § 99-19-105.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see Miss. R. Evid. 1101.

Conduct of trial in death penalty cases, see Miss. Unif. Cir. & County Ct. Prac. R. 10.04.

Bifurcated trials, see Miss. Unif. Cir. & County Ct. Prac. R. 10.04.

## JUDICIAL DECISIONS

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29. Psychological testimony.
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31. Racial discrimination in application of death penalty.
- 31.5. Resentencing.

## II. UNDER FORMER § 99-19-13.

32. In general.
33. Instructions.

34. Qualifications of jurors.
35. Sentence and punishment.

## I. UNDER CURRENT LAW.

## 0.5. Validity.

In a capital murder case, defendant’s assertion that Miss. Code Ann. § 99-19-101 was unconstitutional under the Eighth Amendment was rejected because reckless disregard for human life was not an aspect of Mississippi’s capital sentencing scheme; the State was not required to prove intent to kill, and the jury determined that defendant’s conduct in participating in three homicides satisfied the four elements in Miss. Code Ann. § 99-19-107(a)-(d). *Le v. State*, 913 So. 2d 913 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 622, 163 L. Ed. 2d 508 (2005).

Where petitioner raped and murdered a 79-year-old victim, the burden was upon petitioner to prove that he was mentally retarded to such an extent as to avoid the death penalty. Where his IQ score of 81 placed him in the category of “low dull normal,” and well above the maximum score for “mild” mental retardation, imposition of the death penalty was not cruel and unusual punishment. Further, the jury instructions given at the sentencing phase, in accordance with Miss. Code Ann. § 99-19-101(7), did not violate petitioner’s Eighth Amendment rights since the factors contained in § 99-19-101(7) required that the jury find the requisite intent set forth in *Enmund and Tison* before a death penalty verdict could be returned. *Gray v. State*, 887 So. 2d 158 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Mississippi’s procedure, which requires jurors to find the existence of each aggravating circumstance beyond a reasonable doubt, but does not require the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, does not violate *Apprendi* or *Ring*, since the sentence is not determined by a judge, but by a jury. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).



It was previously determined that Miss. Code Ann. § 97-3-19(2)(e), the portion of Mississippi's death penalty statute that provides for the application of the statute to all defendants found guilty of felony murder, is constitutional, as is Miss. Code Ann. § 99-19-101, which provides that a jury is to determine punishment in capital cases, and lists the mitigating and aggravating factors to be considered; jury instructions used in defendant's capital murder trial were in compliance with *Enmund* and *Tison*, in that the jury found that all four factors contained in Miss. Code Ann. § 99-19-101 as to intent beyond a reasonable doubt were present, including that defendant had intended to kill the victim. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Subsection (5)(d) does not violate the Eighth or Fourteenth Amendments to the United States Constitution. *Evans v. State*, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate requirements of Eighth Amendment that death sentence not be excessive in relation to crime for which it was imposed and that death sentences be imposed with reasonable consistency. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate equal protection or due process; legislature could have rationally decided that one class of murders either presented a different problem from the other or that the death penalty would be more effective deterrent to felony murders than to atrocious simple murders. (Per Smith, J., with three Justices concurring, and Chief Jus-

tice and two Justices concurring in result. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. *Christmas v. State*, 700 So. 2d 262 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

### 1. In general.

Petitioner's argument that the capital sentencing statute, Miss. Code Ann. § 99-19-101, did not permit waiver of a jury for sentencing purposes was without merit because although § 99-19-101 provided for sentencing only by a jury in capital cases, § 99-19-101 specifically provided that a jury could be waived by a defendant in writing. Also, the record showed that petitioner's waiver was knowingly and intelligently made because she was advised as to the sentencing options available to a jury, or a judge sitting without a jury, after her capital murder conviction, and she signed a waiver stating that she understood that she could be sentenced in the discretion of the trial judge to death, life imprisonment without eligibility for parole, or life imprisonment as provided in § 99-19-101(1). *Byrom v. State*, 927 So. 2d 709 (Miss. 2006).

Defendant's capital murder conviction was proper because he did not need to receive a sentencing hearing since, even absent a procedural bar, if the State was

not seeking the death penalty, the only possible sentence for conviction of capital murder was life without parole, Miss. Code Ann. § 99-19-101(1) and 47-7-3(1)(f). Thus, a sentencing hearing was not necessary. *Davis v. State*, 914 So. 2d 200 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Prisoner's claim that waiver of the sentencing jury and the imposition of a sentence of death by the trial court violated Miss. Code Ann. § 99-19-101 was barred from relitigation by Miss. Code Ann. § 99-39-21(3) and was without merit. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Where an inmate pled guilty to capital murder, a jury was not required to impose a sentence of life without parole because it was the only possible sentence. *Daughtery v. State*, 847 So. 2d 284 (Miss. Ct. App. 2003).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. *Jackson v. State*, 860 So. 2d 653 (Miss. 2003).

Reading Miss. Code Ann. §§ 97-3-21, 99-19-101(1), 47-7-3(1)(f), together indicates that a defendant on trial for capital murder may only be sentenced to death or life imprisonment without the eligibility of parole. *Flowers v. State*, 842 So. 2d 531 (Miss. 2003).

A jury's decision to impose a sentence of life imprisonment without eligibility for parole need not be unanimous. *Jordan v. State*, 786 So. 2d 987 (Miss. 2001), cert. denied, 534 U.S. 1085, 122 S. Ct. 823, 151 L. Ed. 2d 705 (2002).

After the jury returned a guilty verdict for capital murder, it was proper for the court to dismiss the jury and impose a

sentence of life without parole in the absence of any of the factors required for imposition of the death penalty since, after the effective date of § 47-7-3, there is really only a choice between death and life without parole in a capital case and, therefore, a jury determination was not necessary. *Fair v. State*, 766 So. 2d 787 (Miss. Ct. App. 2000).

Where the jury was instructed to return separate written findings as required by subsection (7) for both defendants, and it did so, the use of the plural "defendants" within the separate findings did not mean that the jury failed to make findings for each defendant individually. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

At capital sentencing hearing, state may elect to stand on case made at first hearing, if before same jury, or may reintroduce any part of the evidence adduced at first hearing which it considers to be relevant to particular question of whether defendant shall suffer death or be sentenced to life imprisonment. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Any error arising out of admission of video duplicitous of photographic evidence was harmless, where video was no more gruesome than still photographs, sound had been edited from video, it was not lengthy, and it gave jury frame of reference as to crime which had occurred in another county. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Testimony of defendant's family to show impact that defendant's death would have on their lives was not relevant to defendant's character, record, or circumstances of offense, and thus, exclusion of such



evidence was proper in sentencing phase of capital murder trial, despite admission of testimony of victim's family about effect crime had on their lives. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Victim impact evidence, if relevant, is admissible in sentencing stage of capital murder trial. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Testimony by victim's daughter that victim was survived by six children, five grandchildren, three siblings, and both parents and that murder had a "terrible" effect on victim's family, particularly on her mother, was admissible at sentencing trial. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Whether sentencing verdict form led jurors to overlook sentencing options other than death was waived on appeal due to defendant's failure to object, although space for foreman's signature was provided only for first sentencing option, the death penalty, not for second option, life imprisonment. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant was not denied constitutional right to cross-examine witnesses when their former testimony, as presented by them during guilt phase of capital murder trial, was read into evidence at resentencing, where defendant was afforded opportunity at the guilt phase to subject them to cross-examination and nothing new was added to testimony in resentencing; mere fact that defendant's new lawyers may have thought of some different questions to ask witnesses was not sufficient to demonstrate violation of confrontation clause. *Williams v. State*,

684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Evidence pertaining to when defendant in capital murder case would be released on parole if sentenced to life in prison is merely speculative and should not be admitted for consideration at sentencing hearing. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

It is suggestive to provide signature line only under the verdict for death penalty. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury was not required to find that aggravating circumstances outweighed mit-



igating circumstances beyond reasonable doubt before imposing death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Sentencing 17-year-old defendant to death was not prohibited merely because state statute did not explicitly state that 16 or 17-year-old defendant could be punished with execution for capital crime. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Death penalty could be imposed on 17-year-old defendant without particularized findings as to his maturity and moral responsibility. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

In the sentencing phase of a capital murder prosecution, the court properly allowed the introduction of a third party's statement that the third party killed the victims, as well as the third party's further statement indicating that the defendant killed the victims; both the inculpatory and exculpatory portions of the statement were relevant to mitigating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to admit expert testimony regarding the defendant's polygraph tests;

polygraph tests and their results are inadmissible under Mississippi law. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. *Fuselier v. State*, 654 So. 2d 519 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial judge did not err in admitting photographs of the victim into evidence where he made a thorough examination of the photographs in chambers prior to admitting them into evidence, and a pathologist testified that they were probative and relevant on the issue of whether the murder was especially heinous and cruel. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

An agreement between a capital murder defendant and the State for the imposition of a sentence of life imprisonment without the possibility of parole was void and unenforceable on public policy grounds where the defendant was not an habitual offender, since a sentence of life imprisonment without the possibility of parole is not an option unless the defendant is adjudged an habitual offender; the agreement was an attempt to circumvent § 99-19-101, which only authorizes a sentence of life imprisonment or death for capital murder, and its enforcement by the court would bind the parole board, which would effect judicial encroachment on an executive function. *Lanier v. State*, 635 So. 2d 813 (Miss. 1994).

Since Mississippi's capital sentencing procedure requires the jury to determine whether the State has proved its case for the death penalty, the double jeopardy clause will protect a defendant from any subsequent attempt to subject him or her to the death penalty after a jury has impliedly acquitted him or her of the death penalty by determining that only a life sentence was warranted. *Lanier v. State*, 635 So. 2d 813 (Miss. 1994).

The double jeopardy clause did not afford a capital murder defendant protection against further capital sentencing procedures where he was originally sentenced to death by a jury, the death sentence was subsequently reversed due to a confrontation clause problem but there was no finding that the State had failed to prove its case for the death penalty, and the defendant and the State then entered into a sentencing agreement which was found to be void; since there was no acquittal of the death penalty, the double jeopardy clause would not prohibit the State from seeking the death penalty at a subsequent sentencing hearing. *Lanier v. State*, 635 So. 2d 813 (Miss. 1994).

Introduction, at capital sentencing proceeding, of evidence as to defendant's membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white victim. *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992)<sup>1</sup>.

Imposition of death penalty after notice that state would not recommend it violated Fourteenth Amendment due process clause because of insufficient notice that penalty might be imposed; lack of adequate notice created impermissible risk that adversary process might have malfunctioned in case. *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991).

State sentencing statute providing for finding of aggravating and mitigating circumstances by trial court instead of by jury was valid; "heinous, cruel or depraved" aggravating circumstance does not fail to channel sentencer's discretion

in violation of Eighth and Fourteenth Amendments because State Supreme Court has sought to give substance to operative terms of statute and its construction, meets constitutional requirements; and contention that "heinous, cruel or depraved" circumstance was applied arbitrarily and, as applied, did not distinguish accused's case from others in which death sentence was not imposed, was in effect challenge to proportionality review of state's Supreme Court and would be rejected. *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), reh'g denied, 497 U.S. 1050, 111 S. Ct. 14, 111 L. Ed. 2d 828 (1990).

The Federal Constitution's Sixth Amendment guarantee of a criminal defendant's right to a jury trial does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, nor does it require jury sentencing even where the sentence turns on specific findings of fact; capital sentencing proceedings must satisfy the dictates of the due process clause of the Federal Constitution's Fourteenth Amendment. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, it was not error for the district attorney to ask the defendant to take the murder weapon, stick it in his pants, then pull it out, aim it and pull the trigger, where the district attorney was having the defendant demonstrate the



time it took him to go through those motions in response to the defendant's contention that he shot the victim on a sudden impulse. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

In the sentencing phase of a capital murder prosecution, the trial court did not err in excluding testimony of the defendant's family as to the impact of a death sentence on them, testimony of the family of a man who had been convicted of capital murder and executed as to the impact of his death sentence and execution on them, and testimony of the defendant's attorney about events surrounding the execution of that man, whom he had represented on appeal; such testimony is not relevant to the consideration of whether the death sentence should be imposed. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian burial during his closing argument did not constitute error. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

The enactment of this section, which established the bifurcated procedure in capital cases wherein "the jury shall set the sentence," did not eliminate the necessity of the sentencing procedure under the recidivism statute, § 99-19-81, and [former] Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice, when an indictment charges both capital murder and habitual status and a trial is conducted. The statutory language does not indicate that the jury in the guilt/sentencing phases of a bifurcated trial is to decide the issue of recidivism when a defendant is tried as a habitual offender on a charge of capital murder. *Hoover v. State*, 552 So. 2d 834 (Miss. 1989).

The maximum punishment upon conviction for rape under § 97-3-65 was life

imprisonment where there was no proof that the defendant met any of the conditions set forth in this section for imposition of the death penalty. *Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989).

In the sentencing phase of a capital murder prosecution, the trial court did not abuse its discretion in excluding the prison record of the defendant's accomplice who allegedly dominated the defendant and forced him to commit the murders since the prison record did nothing to focus on the defendant's character or susceptibility to domination or on the circumstances of the crime. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Defendant who is granted new trial, after having previously been tried for capital murder and found guilty, and who enters plea of guilty to murder prior to second trial on basis of erroneous advice from counsel that he could be given death penalty upon retrial is entitled to withdraw guilty plea and be given new trial at which, upon conviction, maximum penalty imposed could be life imprisonment. *Odom v. State*, 483 So. 2d 343 (Miss. 1986).

There is no merit to contention that Mississippi may not constitutionally make murder committed in course of robbery "automatically" eligible for death penalty and thus "double count" by using that circumstance for definitional purposes at guilt phase and also as aggravating circumstance. *Evans v. Thigpen*, 631 F. Supp. 274 (S.D. Miss. 1986), aff'd, 809 F.2d 239 (5th Cir. 1987), reh'g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh'g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

Mississippi's capital murder statute requires specific written finding by jury re-



lating to defendant's actions and intent, as prerequisite to imposition of death penalty, to be made in sentencing phase of bifurcated trial, even where defendant has entered plea of guilty in guilt phase of trial; defendant is not procedurally barred from raising issue on appeal notwithstanding defendant's failure to make contemporaneous objection. *Pinkton v. State*, 481 So. 2d 306 (Miss. 1985).

Convicted capital murder defendant is not entitled, during sentencing phase of prosecution, to have jury consider, as relevant mitigating circumstance, that accomplices have received verdicts of life imprisonment from juries in separate capital murder trials. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Incriminating statement elicited from capital murder defendant by deputy sheriff in violation of Fifth and Sixth Amendment rights to counsel is inadmissible in sentencing phase of prosecution. *Mhoun v. State*, 464 So. 2d 77 (Miss. 1985).

In sentencing phase of capital case, prosecutor may secure testimony of coindictée in exchange for life sentence so long as coindictée is not coerced to point where coindictée's credibility is put in substantial doubt. *Mhoun v. State*, 464 So. 2d 77 (Miss. 1985).

Capital murder jury may not be informed during sentencing phase that defendant has already been sentenced to death in another state. *West v. State*, 463 So. 2d 1048 (Miss. 1985).

The jury selection process under §§ 97-3-19 and this section is constitutional. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

Miss. Code § 97-3-21 and this section are not unconstitutional and violative of

the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within their proper discretion. *Smith v. State*, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983), habeas corpus denied, 689 F. Supp. 644 (S.D. Miss. 1988), aff'd, 904 F.2d 950 (5th Cir. 1990), reh'g denied, 912 F.2d 1465 (5th Cir. 1990), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 503 U.S. 930, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992), on remand, 970 F.2d 1383 (5th Cir. 1992), post-conviction relief granted, 648 So. 2d 63 (Miss. 1994).

In a prosecution for capital murder, the defendant was not entitled to separate juries for the guilt and sentencing phases of his trial; since the same jury tried both phases of the trial, the defendant was only entitled to 12 peremptory challenges rather than the 24 he requested. *Tubbs v. State*, 402 So. 2d 830 (Miss. 1981).

In the prosecution for the rape of a two-year-old female child, the failure of the defendant to receive a bifurcated trial on punishment and sentence did not constitute error where the defendant waived such a trial by failing to secure a ruling by the trial court, no objection was raised at the time of sentencing, and the state announced at the beginning of the trial that it would not seek the death penalty. *Minor v. State*, 396 So. 2d 1031 (Miss. 1981).

The death penalty statute is not unconstitutionally vague. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

In a prosecution for capital murder committed during a burglary, the jury's verdict imposing the death penalty complied with this section, despite defendant's contention that the jury did not state the specific facts upon which it based its sentence, where neither this section nor case law required such detailed findings. However, pursuant to § 99-19-105, the death sentence would be reversed and the case

remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. *Coleman v. State*, 378 So. 2d 640 (Miss. 1979).

The trial court in a murder prosecution erred in requiring defendant at the punishment stage of trial to proceed before the state, since the state has the burden of proof not only as to guilt but also as to aggravating circumstances during the punishment stage of a trial. *Gray v. State*, 351 So. 2d 1342 (Miss. 1977).

## **2. Excusing juror in capital murder prosecution, for cause.**

No reversible error resulted from denial of defendant's challenge for cause of prospective juror at resentencing in capital case, where defendant exercised peremptory challenge to remove juror. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Refusal to quash jury panel or declare mistrial at resentencing on capital murder conviction for which defendant originally received death penalty, based on prospective juror's statement during voir dire questioning that he agreed with first sentence that defendant received, was not error; jury panel answered throughout voir dire that they could set aside their prejudices and reach a decision on the evidence, remark made no reference to which sentence was imposed, and there was no evidence at trial that jurors even heard remark. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need "a lot stronger proof" to change their position. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she absolutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror's firm position will suffice. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant's guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).



Trial court's questioning and dismissal of 6 venire members who expressed opposition to the death penalty was adequate, even though defense counsel was not allowed to repeat questions in his own words to prospective jurors during court's voir dire, where the trial court rephrased questions as requested, defense did not request permission to ask further questions, and there was no showing that further questioning would have rehabilitated dismissed venire members. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court could excuse prospective juror from serving on panel hearing capital murder case, on grounds that prospect was mother of 8-year-old boy and that she would feel apprehensive and be distracted if required to be away from child in event jury was sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not improperly excuse prospective juror from service in capital murder case; prospect tailored her response to question whether she could follow the law at both phases of trial to whichever counsel was questioning her, and she indicated she did not want to be involved in jury service and only "guessed" that she would "try" to listen to evidence and be fair to both sides. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to be removed through use of complementary challenge for cause. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death pen-

alty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence pointed, would be fair and impartial and would follow law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sentence, and did not know if she could base her decision on evidence and law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).



A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. *Russell v. State*, 607 So. 2d 1107 (Miss. 1992).

Prospective jurors in a capital murder prosecution who had stated their opposition to the death penalty were improperly excluded without allowing the defense counsel the opportunity to question them. However, this error was harmless beyond a reasonable doubt where the answers the jurors gave were substantially clear, it was reasonably certain that the jurors were "Witherspoon-excludable," and it was unlikely that voir dire examination by the defense counsel would have rehabilitated the jurors sufficient to take them out of Witherspoon. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Jurors who indicate inability to vote for death penalty under any circumstances may be excluded from guilt phase of capital murder prosecution. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

### 3. —By peremptory challenge.

No reversible error results where defendant had peremptory challenges remaining at point where trial court fails to sustain challenge for cause. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory strike of black pro-

spective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and had stated that she might have difficulty in coming to any definite conclusion. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court

did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

### 3.5. Voir dire.

Trial court did not err at resentencing in capital case in refusing defendant's request that every prospective juror be individually sequestered for voir dire in view of publicity surrounding case; such procedure was not required under applicable criminal rule, and limited individual sequestered voir dire was conducted when warranted. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Denial of defense motion at resentencing in capital case to have all prospective jurors answer questionnaire was not error, where defendant cited no authority to support entitlement to such a procedure and failed to present evidence that he was unable to otherwise generally question jurors at voir dire. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Refusal to permit defendant in capital sentencing proceeding to ask prospective jurors hypothetical question as to whether



they would rule out possible involvement of alcohol as mitigating factor in determining whether to recommend life without parole or death penalty was not abuse of discretion. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Attorneys are barred from trying to get jury to promise that under hypothetical set of circumstances, they will vote a certain way. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

#### 4. Victim.

Physical injuries suffered by murder victim and defendant's actions following murder forming *res gestae* of crime may give rise to an inference that murder was committed to avoid arrest, thus establishing aggravating circumstance. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Testimony by murder victim's daughter centering around disappearance and kidnapping of her mother after she left church and describing some of her mother's personal characteristics was necessary to development of case, was relevant to aggravating circumstance of kidnapping, and was admissible in sentencing trial, despite minimum probative value of evidence about victim's marriage, where state made no attempt to establish impact of victim's death on her husband. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

In the sentencing phase of a capital murder prosecution, the trial court did not err in permitting evidence that the victim was 26 years old, had a 7-year-old son, had been married for 4 years, and was very shy and did not like to wear dresses because they exposed her legs where the evidence was proper and necessary to the "development of the case and true characteristics of the victim" and could not serve in any way to incite the jury. *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992).

A circuit court did not err when it allowed the prosecution to present a photograph of a substantial part of the body of the victim in the penalty phase of a capital

murder prosecution, where the photograph was carefully cropped so as to reflect only the back of the victim's body, there was nothing gruesome about the photograph, prosecution witnesses testified that the photograph fairly and accurately depicted the location of the entrance wound on the lower back, and the photograph was presumably offered as evidence that the homicide was "especially heinous, atrocious or cruel." *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

Testimony during the sentencing phase of a capital murder prosecution as to the victim's housekeeping habits did not constitute inadmissible victim impact statements where the evidence was offered to support the State's proof of an attempted robbery inasmuch as the victim was found in her home which was in a state of disarray. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Trial court did not improperly permit admittance during sentencing stage of trial of 9 color slides of homicide victim, spent bullet and certain personal belongings of victim, testimony of pathologist and investigating officer with respect to cause of death and scene of crime, and testimony of victim's brother, as all items were relevant to aggravating circumstances state was required to prove in its capital case, establishing crime scene and other particulars of crime and establishing identity of victim. *Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987), reh'g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh'g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by



defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

In the sentencing phase of a capital murder charge, while admission of testimony as to decedent's character was error in that it had no relevancy to the 8 aggravating circumstances enumerated in this section, the gravity of the error did not arise to the level of a reversible one. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

In the sentencing phase of a capital murder case, the trial court properly admitted photographs into evidence which showed certain physical evidence in a robbed store, including the victim's body. Additionally, cross-examination of defendant in the sentencing phase concerning his guilty plea in an attempt to refute defendant's claim that the homicide was not intentional was not improper impeachment and did not constitute reversible error, since it had relevance on the issue of whether or not the homicide was especially heinous, atrocious or cruel. *Gilliard v. State*, 428 So. 2d 576 (Miss. 1983), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (1983), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In a prosecution for capital murder the trial court properly admitted into evidence at the sentencing phase color photographs showing the body of the victim and the scene of the crime, despite the fact that such proof was not related to the

aggravating circumstances set forth in this section, where such proof was admitted by the defendant by his plea of guilty in open court, and since an orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. *Evans v. State*, 422 So. 2d 737 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 314 (1983).

### **5. Aggravating factors, generally.**

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month-old victim — the death penalty imposed on defendant was (1) not influenced by passion, prejudice, or other existing arbitrary factor; (2) supported by the jury's finding of one or more statutory aggravating circumstances, specifically those set out in Miss. Code Ann. § 99-19-101(5)(d) and (h); (3) not based on invalid statutory aggravating circumstances; and (4) not disproportionate to other cases of that type (death during the commission of a sexual battery of a young victim). Thus, his death penalty was affirmed. *Havard v. State*, 928 So. 2d 771 (Miss. 2006).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month-old victim — an aggravating factor that the capital offense was especially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(h), was not subsumed by the sexual battery aggravator in Miss. Code Ann. § 99-19-101(5)(d); also, the jury could have found that either aggravating circumstance existed in defendant's case. Furthermore, it was not improper to use the underlying felony of sexual battery to elevate defendant's crime to capital murder and use it as an aggravating circumstance; thus, de-

fendant's conviction and sentence were affirmed. *Havard v. State*, 928 So. 2d 771 (Miss. 2006).

Defendant contended that the indictment failed to charge all of the elements necessary to impose the death penalty under Mississippi law, but his argument failed because (1) pursuant to Miss. Code Ann. § 99-19-101(7), a jury only needed to find that defendant killed, and did not need a true *mens rea*; (2) under Miss. Code Ann. § 99-19-101(5), aggravating circumstances existed; and (3) there was no increase in the maximum penalty because the maximum penalty for killing while engaged in the commission of sexual battery was death as the crime was defined as capital murder under Miss. Code Ann. § 97-3-19(2)(e), and, pursuant to Miss. Code Ann. § 1-3-4, a capital murder was a crime punishable by death. *Havard v. State*, 928 So. 2d 771 (Miss. 2006).

Court rejected petitioner's claim that her indictment was defective because the aggravating factors were not included in the indictment. It is unequivocal that in cases where consideration of the death penalty is applicable, there is no requirement that the applicable statutory aggravating factors be included in the indictment. All that is required in the indictment is a clear and concise statement of the elements of the crime charged and the Mississippi death penalty statute, Miss. Code Ann. § 99-19-101, clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment; therefore, every time an individual is charged with capital murder, they are put on notice that the death penalty may result. *Byrom v. State*, 927 So. 2d 709 (Miss. 2006).

Death penalty was properly imposed where defendant was an active participant in a murder; although defendant did not kill the victim, he was an aggressor, and he willfully imposed great danger upon the victim. Defendant held the victim down while another man hit the victim in the head with a hammer, and he chased the victim and brought him back for the beating to continue. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Mississippi's capital sentencing scheme complies with the Sixth Amendment requirement that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, because under Miss. Code Ann. § 99-19-101 it is the jury that determines the presence of aggravating circumstances necessary for the imposition of the death sentence. *Berry v. State*, 882 So. 2d 157 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1694, 161 L. Ed. 2d 528 (2005).

Based on case law and statutes of Mississippi, the submission of the "great risk of death to many persons" aggravator did not violate defendant's Eighth Amendment rights. *Flowers v. State*, — So. 2d —, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003).

In a capital murder case where defendant was indicted separately for each of four murders, submission of the "great risk of death to many persons" aggravator was proper, as evidence regarding the other three killings was relevant in the case at bar during sentencing; there was evidence that the same weapon was used to commit all four murders, testimony linked defendant to the weapon, and eyewitness testimony placed defendant near the scene of the crime. *Flowers v. State*, 842 So. 2d 531 (Miss. 2003).

Contamination of neighborhood's waters with murder victim's body parts, intending to attract alligators, satisfies Miss. Code Ann. § 99-19-101(5)(c)'s "great risk of death to many persons" aggravating circumstance. *Simmons v. State*, 805 So. 2d 452 (Miss. 2001), cert. denied, 537 U.S. 833, 123 S. Ct. 142, 154 L. Ed. 2d 51 (2002).

Statutory aggravating factor providing that defendant could be sentenced to death if defendant killed a person during the commission of a burglary was not unconstitutional as the sentencing body's discretion was limited by statutes that made sure its decisions were directed and limited in such a way, primarily involving the existence of other statutes, that allowed the sentencing body to avoid arbitrary and capricious executions; in other



words, allowing for the death penalty where that aggravating factor existed meant the punishment was not excessive relative to the crime and insured the death penalty is imposed with reasonable consistency. *Grayson v. State*, 806 So. 2d 241 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329 (2002).

"Great risk" aggravator under Miss. Code Ann. § 99-19-101(5)(c) contemplates more than a showing of some degree of risk to a few persons; to pose a great risk, there must be a high probability of danger, not a mere possibility. *Snow v. State*, 800 So. 2d 472 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056 (2002).

"Great risk" aggravator under Miss. Code Ann. § 99-19-101(5)(c) was properly applied to defendant who shot and killed two deputies in a car while one of the deputies was driving, risking that the car would go out of control or that a bullet would ricochet; the fact that no one else was actually injured was immaterial. *Snow v. State*, 800 So. 2d 472 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056 (2002).

It is permissible to use subsections (5)(a) and (5)(b) of this section as separate aggravators even though they were premised on the same conviction. *Hughes v. State*, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

The eight statutory factors do not include arrests or incarcerations; instead only felony convictions involving the use or threat of violence are admissible. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

Evidence was insufficient to support the aggravating factor that the defendant knowingly created a great risk of death to many persons where (1) the defendant and another person were hired to kill the victim, (2) they went to the victim's home on a Saturday morning, and several cars were parked in the driveway, (3) the defendant hid outside the doorway of the victim's home, and (4) when the victim came to the door, the defendant shot him and ran. *Porter v. State*, 732 So. 2d 899 (Miss. 1999).

State is required in capital sentencing proceeding to present evidence of both aggravating circumstances and guilt, so for as *Enmund* factors relating to intent to kill require proof of guilt. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Remand for new sentencing hearing was required due to trial court's failure to supply jury in capital murder trial with properly limiting definition of "especially heinous, atrocious or cruel" upon submission of such aggravating factor to jury; Supreme Court would not reweigh remaining aggravating and mitigating factors disregarding offending factor, or review sentence applying harmless error standards, as weighing of aggravating circumstances was at time of imposition of original sentence function of jury. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997), reh'g denied, 522 U.S. 1009, 118 S. Ct. 591, 139 L. Ed. 2d 427 (1997).

Aggravating circumstance that defendant created great risk of death to many persons applied to defendant who fatally stabbed four children and inflicted life-threatening stab wounds on one adult and



two other children. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Use of "great risk to many persons" aggravating circumstance is not restricted to those crimes where very large numbers of individuals were at risk or those where safety of others than intended few was jeopardized. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Jury in resentencing phase of capital murder prosecution did not have to be instructed on elements of capital murder, murder and kidnapping in order to find beyond reasonable doubt existence of aggravating circumstance that murder was committed during kidnapping, though it would have been optimum situation to include such instruction; omission of kidnapping instruction in resentencing phase was cured by original jury's convicting defendant of murder and kidnapping. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Jury in resentencing phase of capital murder trial did not have to "re-find" elements of murder or kidnapping in finding aggravating circumstance of murder during kidnapping, but could rely on prior finding made by jury during guilt-finding phase. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In considering kidnapping aggravator in reviewing death sentence for murder, Supreme Court had to decide whether jury heard enough evidence to make determination of kidnapping. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Guilt-phase jury's finding of guilt with capital murder instruction was constitutionally sound basis for imposition of

death penalty based on kidnapping aggravator since it narrowed the class of persons eligible for the death penalty. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Evidence at resentencing in capital murder prosecution was sufficient for jury to find aggravating factor that murder was committed during kidnapping, though witness stated that he could not see for sure whether defendant dragged victim into woods or whether her legs were moving to indicate she was walking, where there was other evidence of kidnapping including testimony of witness that he observed defendant tackle victim when she attempted to run away, and sufficiency of proof as to kidnapping had already been decided at guilt phase of trial. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Statute stating that evidence may be presented in capital murder proceeding as to any matter that court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances applies even if it is necessary for another jury to determine the issue of penalty. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Where defendant was charged with two acts of sexual battery, one of which constituted the underlying felony to the capital murder and the other of which served as

the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which were unsupported by evidence that could substantiate jury's finding of those factors. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 chil-

dren to death and inflicted life-threatening stab wounds on one adult and another child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder aggravating factor for when defendant knowingly creates great risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Considering underlying crime of felonious abuse as aggravating factor during sentencing of capital murder defendant did not fail to narrow class of defendants eligible for death penalty, in violation of Eighth Amendment; fact that aggravating circumstance duplicates element of crime does not make death sentence constitutionally infirm. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Submission of "robbery" aggravating circumstance during penalty phase of capital murder case did not violate constitutional prohibition against cruel and unusual punishment, although defendant was charged with murder while in commission of armed robbery. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Testimony dealing with victim's murder, offered at resentencing in capital murder case to give second sentencing jury evidence of specific facts surrounding murder, not to prove murder was "especially atrocious, heinous or cruel," was relevant, and its admission did not violate due process by relating to aggravating factor not mentioned in motion in limine;



defendant entered sentencing hearing knowing that prosecution was seeking death penalty and that State would attempt to prove 2 aggravators and proof associated with each, and was apprised that jury would be informed of facts surrounding murder, but did not object. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

The new rule announced in *Willie v. State* (Miss. 1991) 585 So. 2d 660 — that a jury may not “doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators” when determining the sentence to be imposed in a capital murder case — is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh’g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant’s propensity for future crimes during the sentencing phase of a capital murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by subsection (5) of this section. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

Introduction, at capital sentencing proceeding, of evidence as to defendant’s membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of

white victim. *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992).

Conviction of assault to commit rape occurring 20 years prior to capital murder trial may not be considered as aggravating circumstance in determining whether to impose death penalty when the conviction is thereafter reversed. *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), on remand, 547 So. 2d 59 (Miss. 1989).

Trial court did not improperly permit admittance during sentencing stage of trial of 9 color slides of homicide victim, spent bullet and certain personal belongings of victim, testimony of pathologist and investigating officer with respect to cause of death and scene of crime, and testimony of victim’s brother, as all items were relevant to aggravating circumstances state was required to prove in its capital case, establishing crime scene and other particulars of crime and establishing identity of victim. *Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987), reh’g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh’g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

Petitioner who at time of homicide was under suspended sentence from convictions for grand larceny and burglary could properly be deemed to be “under sentence of imprisonment” for purposes of subsection (5)(a) of this section. *Evans v. Thigpen*, 631 F. Supp. 274 (S.D. Miss. 1986), aff’d, 809 F.2d 239 (5th Cir. 1987), reh’g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh’g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or



improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling *Johnson v. State* (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) *Johnson v. State*, 547 So. 2d 59 (Miss. 1989), but see *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to § 97-3-19(2)(d) and in imposing the death penalty for committing murder by pecuniary gain pursuant to subsection (5)(f) of this section. *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

The "beyond a reasonable doubt" standard of proof applies in the sentencing phase of capital trials. Capital sentencing juries have no authority to find statutory aggravating circumstances unless such "unanimously be found beyond a reasonable doubt." *White v. State*, 532 So. 2d 1207 (Miss. 1988).

Submission to jury of aggravating circumstances alleging commission of murder in course of burglary, robbery, and/or kidnapping did not deny defendant his constitutional rights. *Lockett v. State*, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510

U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

In the sentencing phase of a capital murder trial, the state is limited to offering evidence that is relevant to one of aggravating circumstances included in this section. *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

Where the existence of aggravating circumstances enumerated in this section is in evidence, the trial court will not peremptorily instruct the jury to return a verdict of life imprisonment. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

Under subsection (7) of this section, the jury must find the existence of only one aggravating circumstance to return a death sentence. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

Prior conviction for rape, crime of violence to person, is admissible during sentencing phase of capital murder prosecu-

tion. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

In a prosecution for murder the trial court during the sentencing phase of the trial properly confined the jury to finding only aggravating circumstances that were proven by the evidence, where the court specifically instructed the jury that it was to find beyond a reasonable doubt that one or more of the three stated aggravated circumstances existed before a death penalty verdict could be returned, and where it specifically instructed that if none of these elements were found to exist the death penalty could not be imposed. *Wheat v. State*, 420 So. 2d 229 (Miss. 1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1507, 75 L. Ed. 2d 936 (1983), denial of habeas corpus aff'd, 599 So. 2d 963 (Miss. 1992).

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831 (1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992).

## 6. —Robbery and pecuniary gain as separate factors.

Where a shooting was committed during a robbery, the evidence supported the jury's finding of an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(d), even if defendant was not the shooter; whether or not defendant intended to kill the victim was irrelevant

because Miss. Code Ann. § 97-3-19(2)(e) defines capital murder, in part, as the killing of a human being when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery. *Dycus v. State*, 875 So. 2d 140 (Miss. 2004).

Trial court in sentencing proceeding should not submit as separate aggravators both fact that capital murder was committed during commission of robbery and that it was committed for pecuniary gain; where two aggravators essentially comprise one circumstance, it is improper for jury to doubly weigh that circumstance. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and, thus, there was no reason for counsel to object to underlying felony being counted as aggravator. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Although evidence that safe in victims' home contained proceeds of illegal drug sales made by defendant's brother was not relevant to pecuniary gain aggravating circumstance during sentencing phase of capital murder case, any error in admitting such evidence was harmless, where



evidence of brother's drug conviction and his connection with money in safe was admitted during guilt phase of trial. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in allowing the jury to consider the aggravating factors of "murder committed while in the commission of a robbery" and "murder committed for pecuniary gain" as 2 separate and distinct aggravators. *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992).

In the sentencing phase of a capital murder prosecution arising from a murder committed while the defendant was engaged in the commission of a robbery, the pecuniary gain and robbery aggravating circumstances may not be given. When life is at stake, a jury cannot be allowed the opportunity to doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Where an indictment charges a robbery/murder capital offense and robbery is designated as an aggravating circumstance, pecuniary gain should not be used as an aggravating circumstance unless clearly supported by the evidence. Likewise, the aggravating circumstance that the capital offense "was committed for the purpose of

avoiding lawful arrest," should not be used unless clearly supported by the evidence. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

There is no merit to contention that Mississippi may not constitutionally make murder committed in course of robbery "automatically" eligible for death penalty and thus "double count" by using that circumstance for definitional purposes at guilt phase and also as aggravating circumstance. *Evans v. Thigpen*, 631 F. Supp. 274 (S.D. Miss. 1986), aff'd, 809 F.2d 239 (5th Cir. 1987), reh'g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh'g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

Evidence that, after killing victim, capital murder defendant took victim's automobile and subsequently pawned things of value contained in automobile may be basis for finding, as aggravating circumstances, both that murder took place during commission of robbery and that murder was for pecuniary gain. *West v. State*, 463 So. 2d 1048 (Miss. 1985).

Testimony in a capital murder prosecution was sufficient for the jury to find that the infliction of the wounds was "unnecessarily tortuous" and was "pitiless", so that it was properly found to be "especially heinous, atrocious or cruel" within the meaning of subsection (5)(h) of this section; moreover, the jury was properly permitted to consider as a aggravating circumstance, under subsection (5)(d) of this section, that the murder was committed in the course of the commission of a robbery; finally, upon careful examination of the sentencing phase in the manner required by § 99-19-105, the Supreme Court would find that defendant's execution would be consistent and even-handed with all death penalty cases affirmed since 1976. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction



relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

Following defendant's conviction for capital murder, based upon a murder committed in the course of a robbery, the trial court's instructions to the jury during the sentencing phase that it could consider as aggravating circumstances both that the murder was committed during the commission of a robbery and that it was committed for pecuniary gain, pursuant to subsections (d) and (f) of this section, did not so unduly prejudice defendant that the issue could be raised for the first time on appeal; moreover, the trial court did not err in permitting the jury to consider as an aggravating circumstance that the capital offense was committed while the defendant was engaged in the commission of a robbery, pursuant to subsection (5)(d) of this section, even though the robbery was an element of the capital murder, since the conviction of capital murder did not mandate the defendant's execution, but merely subjected him to a jury finding in this regard, prior to which he could put on evidence of mitigating circumstances of an unlimited nature pursuant to subsection (6) of this section, so as to convince the jury that he should not be executed; in addition, the trial court did not err in instructing the jury, pursuant to subsection (5)(e) of this section, that they could find as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest, in view of testimony by an accomplice that defendant and codefendant planned when setting up the robbery that they would leave no witnesses; nor did the court err in admitting evidence of two prior convictions for armed robbery and simple robbery, pursuant to subsection (5)(b) of this section, even though the underlying crimes occurred subsequent to the murder for which defendant was being sentenced, since those crimes had just as much or more bearing on the question of whether he should suffer the death penalty as crimes committed by him prior to the capital offense; finally the court did not err in admitting photographs of the victim and the rope allegedly used by

defendant to strangle the victim, since they were relevant to whether the crime was especially heinous, atrocious, or cruel, an aggravating circumstance pursuant to subsection (5)(h) of this section. *Leatherwood v. State*, 435 So. 2d 645 (Miss. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984).

#### 7. —“Especially heinous, atrocious, or cruel”.

In a capital murder case, the especially heinous, atrocious, and cruel aggravator was properly presented to the jury, as it was sufficiently supported by the evidence because: (1) a doctor testified that the victim's death could be attributed to either manual strangulation, a blow to the head, or drowning; (2) the victim suffered multiple bruises about her neck, face, and arms, blunt trauma to her head, and that she aspirated water into her lungs, causing significant cellular damage and edema; (3) the doctor testified that if the victim received the head trauma first, she could have been completely aware of her surroundings during the strangulation and immersion of her head; and (4) the victim's ability to remain conscious after sustaining a lethal wounds had no relevance to the aggravator. *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

Post-conviction relief was denied in a capital murder case on the issue of whether a circuit court erred by using the aggravating circumstance of “especially heinous, atrocious, or cruel” based on a sufficiency of the evidence; even if it was not barred, the issue was without merit since the victim was beaten, strangled, raped, stabbed, and left to die as her home was set on fire. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Evidence that defendant abducted the victim from her home in broad daylight, forcing her to leave her three-year-old son sleeping alone in the house; forced her to drive to a wooded area on the pretext that he was going to deliver her to his partner while he retrieved ransom money from her husband; upon arriving at the wooded area the victim, undoubtedly, realized that there was no partner waiting for defendant; defendant shot the victim in the back of the head and then drove back

into town and continued with his plan to extort money from the victim's husband, where for two days he led the husband to believe that his wife was alive and well was sufficient to support the especially heinous aggravator. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

There was sufficient evidence in the record which would have allowed the jury to find the "especially heinous" aggravator to exist under Miss. Code Ann. § 99-19-101(5)(h) where the victim was ordered to drive to a deserted dirt road at knife point, where she was bound, gagged and raped. Defendant then slit her throat and left the victim to bleed to death in her car while her killer cleaned up after himself and when she attempted to scream for help, defendant shot her in the head. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

Following evidence established that an inmate's four murders fit within the limiting definition of "heinous, atrocious, and cruel": (1) he shot one victim four times with two different guns; (2) one victim called out for help, and another pleaded for her children's safety before being shot in the head; (3) two young boys were brutally murdered; (4) the inmate's daughter was shot in the back, but managed to escape the massacre; (5) the inmate told one victim, "I told you I would kill you one of these days"; and (6) he confessed to his wife that he had "just killed a family." *Stevens v. State*, 867 So. 2d 219 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 222, 160 L. Ed. 2d 96 (2004).

In a capital murder case, in upholding defendant's sentence of death as proportionate to the crime, the Supreme Court held that the fact that the victim suffered vaginal injuries, multiple scrapes and bruises about her body, and two stab wounds satisfied the Miss. Code Ann. § 99-19-101(5)(h) requirement that the crime be "especially heinous, atrocious, or cruel." *Howard v. State*, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

Evidence was sufficient to establish that the murder of two victims was especially heinous, atrocious, or cruel where (1) one victim was shot in the head which

blew out his eye socket, (2) he did not die from this first shot, but began to severely bleed from his wound, (3) he left his car and was forcibly walked a short distance from the road, (4) he was then stuffed into the trunk of his car, only to be dumped out and shot through his temple, this being the fatal shot, (5) he was then dragged into the woods, and (6) the other victim, the two year old child of the first victim, was then forcibly led into the woods and shot in the head as he leaned over his father. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel," but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in *Maynard v. Cartwright* (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, *Clemons v. Mississippi* (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and *Maynard* and *Clemons* did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; *Clemons* decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to *Clemons* decision that decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. *Stringer v.*



Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Where, in sentencing hearing which ended in jury determination that accused should receive death penalty, court instructed jury that, in considering whether murder was "especially heinous, atrocious, or cruel" within meaning of statutory aggravating factors, "heinous" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile," and "cruel" meant "designed to inflict a high degree of pain with indifference to, or even enjoyment of, a suffering of others," U.S. Supreme Court reversed state Supreme Court judgment insofar as it relied on "heinous, atrocious, or cruel" aggravating factor, and remanded case for further consideration, holding that limiting instruction used by trial court was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

State sentencing statute providing for finding of aggravating and mitigating circumstances by trial court instead of by jury was valid; "heinous, cruel or depraved" aggravating circumstance does

not fail to channel sentencer's discretion in violation of Eighth and Fourteenth Amendments because State Supreme Court has sought to give substance to operative terms of statute and its construction meets constitutional requirements; and contention that "heinous, cruel or depraved" circumstance was applied arbitrarily and, as applied, did not distinguish accused's case from others in which death sentence was not imposed, was in effect challenge to proportionality review of state's Supreme Court and would be rejected. *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), reh'g denied, 497 U.S. 1050, 111 S. Ct. 14, 111 L. Ed. 2d 828 (1990).

It was not improper for aggravating circumstance described in subsection (5)(h) of this section ("especially heinous, atrocious, or cruel" offense) to be submitted to jury without limiting instruction, where defendant, during course of robbery, had ordered grocery store clerk to kneel and had shot him in head from distance of approximately 3 or 4 feet prior to leaving store, particularly where this circumstance was one of several statutory aggravating circumstances relied on by State and found by jury. *Evans v. Thigpen*, 631 F. Supp. 274 (S.D. Miss. 1986), aff'd, 809 F.2d 239 (5th Cir. 1987), reh'g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), reh'g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

The Mississippi Supreme Court's construction of the provision of subsection (5)(h) of this section, that one aggravating circumstance to be considered by a jury in the sentencing phase of a capital murder trial is whether the murder was especially heinous, atrocious, or cruel, eliminated the risk that the death penalty would be inflicted in an arbitrary and capricious manner. *Gray v. Lucas*, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815 (1983).

Subsection (5)(h) of this section was not unconstitutionally vague in its provision for the imposition of the death penalty when the offense committed was especially heinous, atrocious or cruel, since Mississippi courts had consistently ap-



plied a limiting construction of this factor. *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), reh'g denied, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815 (1983), reh'g denied, 462 U.S. 1124, 103 S. Ct. 3099, 77 L. Ed. 2d 1357 (1983).

Instruction on aggravator of committing murder in order to avoid arrest was supported in capital sentencing proceeding by evidence that victim was still alive after rape and that defendant then stuffed defendant's panties down her throat, and by evidence that defendant mutilated victim's genital area after she died so that authorities would think a "sex fiend" had committed crime. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Instruction on especially heinous, atrocious, or cruel aggravating circumstance at capital sentencing proceeding was not unconstitutionally vague or overbroad, where aggravator was defined as involving a conscienceless or pitiless crime which is unnecessarily torturous to victim. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Photographs can provide graphic proof of statutory aggravating circumstance that capital offense was heinous. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Fifteen photographs of murder victim gave evidentiary value to aggravating circumstance of acts of heinous, atrocious, and cruel nature of murder, and, thus, were admissible to show aggravating circumstances. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Instruction on "heinous, atrocious, or cruel" aggravating factor was supported by evidence that defendant stabbed victim 31 times because "it felt good," that he left her lying in a pool of her own blood, that she gasped and gurgled while blood filled one of her lungs, and that she eventually bled to death some minutes later. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Instruction on aggravating factor for death penalty purposes that capital of-

fense was especially heinous, atrocious or cruel was not unconstitutionally vague, as instruction set out definitions of the terms, and provided examples. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Instruction on aggravating factor for death penalty purposes that murder was especially heinous, atrocious or cruel was not inadequate on ground that it failed to speak exclusively to defendant's moral culpability, allegedly told jury that defendant had in "fact" used method of killing that caused serious mutilation, or because "heinous, atrocious, or cruel" is disjunctive rather than conjunctive. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

At resentencing phase of capital murder trial, photographs portraying stab wound to chest and heart of victim and depicting the area of victim's vagina and anus, which had been excised, were relevant to assist pathologist in explanation to jury and assist jury in understanding nature and extent of the injuries, and had probative value in establishing beyond a reasonable doubt the death penalty aggravating circumstance that the murder was especially heinous, atrocious or cruel. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Photographs proving cruelty inflicted on victim were relevant to the death penalty aggravating circumstance that murder was especially heinous, atrocious or cruel even though the fact of killing, the nature and extent of victim's wounds, and the cause of death were admitted and not in dispute. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Capital sentencing instruction concerning "especially heinous, atrocious, or cruel" aggravating circumstance ade-

quately channelled jury's discretion and thus was not unconstitutional, despite fact that part of instruction was invalid under *Shell. Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Evidence, including number of wounds, number of weapons used, and victim's prolonged death, supported finding of "especially heinous, atrocious, or cruel" aggravating circumstance in sentencing of defendant for capital murder. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

The "specially heinous" aggravator does not violate Eighth Amendment. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

The "specially heinous" aggravator does not violate Fourteenth Amendment. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if cause of death was strangulation, as pathologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Autopsy photographs may be admitted during sentencing phase of capital murder

prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily torturous to the victim." *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and ag-



gravation before death or where a lingering or torturous death was suffered by the victim." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

A circuit court did not err when it allowed the prosecution to present a photograph of a substantial part of the body of the victim in the penalty phase of a capital murder prosecution, where the photograph was carefully cropped so as to reflect only the back of the victim's body, there was nothing gruesome about the photograph, prosecution witnesses testified that the photograph fairly and accurately depicted the location of the entrance wound on the lower back, and the photograph was presumably offered as evidence that the homicide was "especially heinous, atrocious or cruel." *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

Submission of aggravating circumstances of heinous, atrocious, and cruel crime did not deny defendant his rights under Constitution of Mississippi and United States; although defendant con-

tended there was no evidence supporting this aggravating circumstance and that evidence was uncontroverted that victim was shot dead as soon as he opened door to his house; state argued that there was no evidence that victim was dead or even unconscious when later shots were fired. *Lockett v. State*, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Expert testimony on pain involved in death of murder victim by strangulation or suffocation is admissible in penalty phase of capital murder prosecution on issue of whether killing was especially heinous, atrocious, or cruel. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

In order for jury considering whether to impose death penalty on basis of aggravating circumstances "especially heinous, atrocious, or cruel" to be adequately guided in deliberation, jury should be informed of construction given that language by Mississippi Supreme Court. *Mhoon v. State*, 464 So. 2d 77 (Miss. 1985).

Testimony in a capital murder prosecution was sufficient for the jury to find that the infliction of the wounds was "unnecessarily tortuous" and was "pitiless", so that it was properly found to be "especially heinous, atrocious or cruel" within the meaning of subsection (5)(h) of this section; moreover, the jury was properly permitted to consider as an aggravating circumstance, under subsection (5)(d) of this section, that the murder was committed in the course of the commission of a robbery; finally, upon careful examination of the sentencing phase in the manner required by § 99-19-105, the Supreme Court would



find that defendant's execution would be consistent and even-handed with all death penalty cases affirmed since 1976. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

Where the undisputed evidence in a prosecution for capital murder indicated that the police officer victim and his companion were dressed in police uniforms and had driven up in a plainly marked police department vehicle, that the area was lighted, that defendant could see all these circumstances, and that defendant nevertheless pointed a shotgun directly at a police officer and fired two times, causing his death, the aggravating circumstance of "especially heinous, atrocious, and cruel" was proper under this section. *Edwards v. State*, 441 So. 2d 84 (Miss. 1983).

In the sentencing phase of a capital murder case, the trial court properly admitted photographs into evidence which showed certain physical evidence in a robbed store, including the victim's body. Additionally, cross-examination of defendant in the sentencing phase concerning his guilty plea in an attempt to refute defendant's claim that the homicide was not intentional was not improper impeachment and did not constitute reversible error, since it had relevance on the issue of whether or not the homicide was especially heinous, atrocious or cruel. *Gilliard v. State*, 428 So. 2d 576 (Miss. 1983), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (1983), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not

outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

This section does not impose cruel and unusual punishment. Nor does it unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since there is no requirement that the jury impose death when aggravating circumstances are shown and mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, this section is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially heinous, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. *Coleman v. State*, 378 So. 2d 640 (Miss. 1979).

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursu-

ant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. *Washington v. State*, 361 So. 2d 61 (Miss. 1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2016, 60 L. Ed. 2d 388 (1979).

**8. —“Avoiding or preventing lawful arrest or effecting escape from custody”.**

Post-conviction relief was denied in a capital murder case based on the argument that the aggravator of “avoiding or preventing a lawful arrest or effecting an escape from custody” aggravator was given because it was procedurally barred; even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

“Avoiding arrest” was properly submitted as an aggravating factor under Miss. Code Ann. § 99-19-101(5)(e) in defendant's capital murder case because defendant indicated in his statement that after raping the victim, he wiped her car down to remove any traces of fingerprints that he might have left on the car, then asked the victim if she would tell anyone what had happened. After indicating that she would not, defendant, not believing her answer, slit her throat, then removed several items from the victim's car and threw them into the woods to make it appear as if someone else was responsible for the crime. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

Where a jury returned a verdict of capital murder with avoiding arrest as a

aggravating factor, and the verdict stated “the offense was committed with the purpose of covering up and hiding evidence,” there was no doubt that the jury found the “avoiding arrest” aggravator to exist under Miss. Code Ann. § 99-19-101(5)(e), and the verdict form complied with Miss. Unif. Cir. & County Ct. Prac. R. 3.10. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

In a capital murder case, a court properly submitted to the jury the aggravating circumstances that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest where there was sufficient evidence from which it could be reasonably inferred that a substantial reason for killing the victim was to conceal the identity of the killer or killers so as to avoid apprehension and eventual arrest by authorities. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

Evidence was sufficient to justify an instruction on avoiding or preventing a lawful arrest where (1) the victim's body was covered with debris and hidden under the flooring of an abandoned house in a remote area, (2) her chest was burned, impeding the investigation into the cause of her death, (3) there was evidence that the defendant knew the victim and that, shortly after the disappearance, he had his hair cut short, and (4) the defendant had prior convictions for sex crimes. *Hughes v. State*, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

The court would reject the contention that, because every murder necessarily eliminates a witness to that crime, the avoiding arrest aggravator must be given with a limiting instruction channeling the jury's focus to those situations where there is specific evidence demonstrating that one of the purposes behind the killing was the killer's desire to avoid detection and apprehension for an underlying crime. *Wiley v. State*, 750 So. 2d 1193 (Miss. 1999), cert. denied, 530 U.S. 1275, 120 S. Ct. 2742, 147 L. Ed. 1007 (2000).

Evidence was sufficient to establish the “avoiding arrest” aggravating factor where the victims in the case knew the defendant and, furthermore, the defen-



dant made efforts to dispose of and/or conceal the evidence of his crime. *Wiley v. State*, 750 So. 2d 1193 (Miss. 1999), cert. denied, 530 U.S. 1275, 120 S. Ct. 2742, 147 L. Ed. 1007 (2000).

It was reversible error for the court to allow the introduction into evidence during the sentencing phase testimony that defendant marked gang signs on the jail cell wall, notwithstanding the assertion that the testimony was relevant to show whether the defendant killed the victim to avoid arrest. There was no basis for the admission of any threat evidence on the factor of avoiding arrest. *Walker v. State*, 740 So. 2d 873 (Miss. 1999).

Evidence was sufficient to establish that a murder was intended to avoid arrest where statements by the defendant showed that he shot the victim in an effort to avoid getting caught, and there was also the compelling evidence that the defendant and his coperpetrator burned the vehicle stolen from the victim. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

Evidence was sufficient in capital murder prosecution to prove penalty phase aggravating circumstance that capital offense was committed for purpose of avoiding or preventing lawful arrest; defendant's friend testified that defendant shot victim as victim attempted to call police because victim would know his face and, at point defendant shot victim, defendant could have walked away without further interference from victim. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place, and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

If there is evidence from which it may be reasonably inferred that substantial

reason for killing was to conceal identity of killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prosecution in capital murder case could establish aggravating factor of avoiding arrest, by introducing testimony and photograph of police crime expert showing that body of victim had been burned in hands and pubic area, in order to preclude identification of victim by fingerprints or of perpetrator through pubic hair combings, even though defendant claimed that burning taking place after murder had been completed did not show that murder was undertaken to cover up earlier crimes including sexual assault; "avoiding arrest" aggravator extended also to avoiding arrest for killing. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

"Avoiding arrest" aggravating factor was properly submitted to jury in penalty phase of capital murder case, even though defendant claimed that arrest avoidance was inherent in every murder, as it by definition eliminated one of the possible witnesses and that further limiting instruction was required to channel jury's focus on situations in which there is specific evidence demonstrating that one of the purposes beyond the killing was desire to avoid detection and apprehension for underlying crime. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).



Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead defendant doused body with gasoline and burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The aggravating circumstance that the capital murder was committed for the purpose of "avoiding or preventing a lawful arrest" does not apply only to murders of law enforcement officers; thus, the question of whether this aggravating factor should be submitted to the jury does not depend on whether the victim was a law enforcement officer but whether the facts and circumstances prove that avoiding lawful arrest was a motive in the killing. *Chase v. State*, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The statutory aggravating circumstance that "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" is properly submitted to the jury if evidence exists from

which the jury could reasonably infer that concealing the killer's identity, or covering the killer's tracks to avoid apprehension and arrest, was a substantial reason for the killing. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

Where an indictment charges a robbery/murder capital offense and robbery is designated as an aggravating circumstance, pecuniary gain should not be used as an aggravating circumstance unless clearly supported by the evidence. Likewise, the aggravating circumstance that the capital offense "was committed for the purpose of avoiding lawful arrest," should not be used unless clearly supported by the evidence. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

#### 9. —Other convictions.

Court rejected defendant's claim that evidence of prior bad acts was improperly admitted in violation of Miss. R. Evid. 404(b) because defense counsel never objected and the prior bad act evidence was admitted in rebuttal after the defense opened the door to defendant's character. Also the court rejected defendant's claim that the prior bad act evidence was not relevant to any of the statutory aggravating factors enumerated in Miss. Code Ann. § 99-19-101(5) because § 99-19-101(1) did not limit the evidence that could be presented at the sentencing phase to evidence relevant to the aggravating circumstances, but rather the State was allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

Where an inmate was previously convicted in another state of rape, and consent was not an issue, the inmate's prior crime must be viewed as one of violence sufficient to be used as an aggravating

circumstance pursuant to Miss. Code Ann. § 99-19-101(5)(b) *Hughes v. State*, 892 So. 2d 203 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

In order for 12 members to unanimously agree that a statutory aggravator under Miss. Code Ann. § 99-19-101 exists, they must be able to know about the crime that took place earlier, even if that crime indicates that the defendant has the propensity to commit crimes of violence wielding the same type weapon; the trial court is not limited to submitting only an indictment which notes that the defendant committed armed robbery previously, and that armed robbery is a crime involving the use or threat of violence to the person. *Randall v. State*, 806 So. 2d 185 (Miss. 2001).

One who is under a suspended sentence is “under sentence of imprisonment,” an aggravating circumstance listed at Miss. Code Ann. § 99-19-101(5)(a) for one having committed a capital offense. *Brown v. State*, 798 So. 2d 481 (Miss. 2001).

*Miss. R. Evid.* 803(22) did not prohibit the introduction in a murder trial the defendant's prior conviction for aggravated sexual battery in support of the aggravating circumstance that he was previously convicted of a felony involving the use of threat of violence to the person since the prior conviction was not introduced to prove any fact essential to sustain that judgment but was, instead, introduced solely to prove the conviction. *Evans v. State*, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the reversal of the defendant's New York conviction required a re-examination of the Mississippi death sentence because (1) the reversal of the conviction made evidence thereof irrelevant to the Mississippi sentencing decision, and the fact that the accused had served time in prison did not change this; (2) the use of the New York conviction in the Mississippi sentencing hearing was prejudicial, especially given the Mississippi prosecutor's comments; (3) vacating a death sentence based on a prior conviction when that conviction is set aside does

not undermine state capital sentencing procedures, since a rule that regularly gives a defendant the benefit of such post-conviction relief is not arbitrary or capricious; and (4) assuming that a death sentence in this case would be proper under Mississippi law even absent evidence of the New York conviction, that fact would not be determinative of this case, since (a) the Mississippi appellate court had expressly and correctly refused to rely on harmless-error analysis because of the prosecutor's reliance on this particular aggravating circumstance, and of the prosecutor's reliance on this particular aggravating circumstance, and (b) the sentencing jury in this case had not merely considered an invalid aggravating circumstance supported by otherwise admissible evidence, but was allowed to consider evidence which was materially inaccurate. *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), on remand, 547 So. 2d 59 (Miss. 1989).

Conviction of assault to commit rape occurring 20 years prior to capital murder trial may not be considered as aggravating circumstance in determining whether to impose death penalty when the conviction is thereafter reversed. *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), on remand, 547 So. 2d 59 (Miss. 1989).

Evidence of a conviction subsequent to crime for which person is being sentenced may be used as proof of aggravating circumstances. *Wells v. State*, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

Jury was not improperly required to weigh same facts twice against mitigating evidence, in violation of double jeopardy clause, when sentencing court allowed defendant's conviction for capital murder of second victim to be considered as an aggravating circumstance; court was not faced with one action for which defendant could be prosecuted on either underlying crime or capital murder, but rather, there were actually two murder victims—the product of two separate criminal actions by defendant. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d



1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Conviction for capital murder of one victim was admissible as aggravator at sentencing trial for killing of another victim. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Fact that, at original sentencing trial in case, neither of defendant's convictions at guilt trial for capital murder of victims was final and that only reason that conviction for killing of second was final at time of resentencing trial for killing of first victim was that original death sentence was reversed and case remanded for resentencing did preclude use of conviction for killing second victim as aggravator at resentencing on conviction for killing of first victim. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Court properly refused instruction that aggravating factor that defendant had killed second victim did not allow jury to punish defendant for that killing where counsel would not agree to redaction of additional sentence stating that punishment assessed against defendant "will be served in addition to his punishment for the capital murder" of second victim, as that was speculation. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Certified copy of indictment and judgment as well as testimony of police officers present during prior incident involving gun was sufficient to establish aggravating circumstance during sentencing phase of capital murder case that defendant committed prior felony involving use or threat of violence to person, even if gun defendant had used was inoperable and separate kidnapping charges against him

were dropped. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Rules of impeachment found in Rule of Evidence concerning details of previous conviction were inapplicable where state was not seeking to impeach defendant's credibility with evidence of prior conviction but was attempting to prove beyond reasonable doubt the death penalty aggravator, in murder prosecution, that defendant was previously convicted of a felony involving the use or threat of violence to the person. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

As a general rule, in sentencing phase of capital case, prior conviction of another capital offense or of felony involving use or threat of violence to the person is admissible as an aggravating circumstance to be considered by jury in determining punishment. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Prosecutor's comment on capital murder defendant's voluntary drug use to rebut mitigating circumstance of no significant history of criminal activity did not violate defendant's right to fair trial, where defendant placed his prior criminal activity at issue. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Individual can have prior conviction involving use of threat or violence and yet not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted



of felony involving use of threat or violence, provided that it was properly certified. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evidence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

"Pen packs" detailing defendant's prior offense were relevant during penalty phase of capital murder trial to prove 2

aggravating circumstances, that defendant was previously convicted of another capital offense or felony involving use or threat of force and that defendant committed capital offense while under sentence of imprisonment, where such evidence was not offered to impeach defendant or any of his witnesses. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Indictment contained in defendant's "pen pack" was relevant and admissible during penalty phase of capital murder case to show that defendant's previous escape was crime of violence for purposes of statutory aggravating factor. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Suspended sentence for grand larceny conviction that capital murder defendant was serving at time of murder was "sentence of imprisonment" for purposes of aggravating circumstances set forth under capital sentencing statute. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Robbery is per se crime of violence, for purposes of aggravating circumstances set forth under capital sentencing statute. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A circuit court did not err in admitting evidence of the defendant's 10 prior felony convictions in the penalty phase of a capital murder prosecution, even though none of the convictions was "a felony involving the use or threat of violence to the person," where the use of the prior convictions was in the nature of rebuttal evidence after the defendant produced a number of witnesses who testified regarding his past, since the convictions were as much a part of the defendant's life story as the proof he offered himself. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d

422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

The aggravating circumstance of "previous conviction of a felony involving the use or threat of violence to the person" was valid, even though the defendant had been awarded damages in the amount of \$15,000 in connection with the underlying prior conviction as the result of a successful civil suit against a police officer who shot the defendant. A trial court cannot retry all prior convictions, and therefore a trial judge is not required to look beyond a prior conviction which is valid on its face. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

In the sentencing phase of a capital robbery/murder prosecution, convictions for armed robberies committed by the defendant after the robbery/murder were admissible as aggravating circumstances. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Proof of prior convictions may be made by certified copies of judgments of convictions. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Even if the trial judge improperly admitted evidence of the defendant's prior armed robbery conviction during the sentencing phase of his trial, the sentence of death would be affirmed where there were 3 other aggravating circumstances found by the jury pursuant to subsection (5) of this section. *Cabello v. State*, 524 So. 2d 313 (Miss. 1988).

Trial court did not err in submitting to jury aggravating circumstance of murder committed while under sentence of imprisonment, despite argument of defendant that Texas conviction should be viewed as juvenile disposition since defendant was under 18 at time he received sentence and that probated sentence is not "sentence under imprisonment" within ambit of subsection (5)(a) of this section. Nothing in statutory language requires that aggravating circumstance of sentence of imprisonment be pursuant to Mississippi conviction, and when person

has been convicted and placed on probation, such sentence is "sentence under imprisonment." *Lockett v. State*, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked § 99-19-101 in listing the mitigating factors which the jury could consider. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Prior conviction for rape, crime of violence to person, is admissible during sentencing phase of capital murder prosecution. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

Admission, during penalty phase of capital murder prosecution, of papers which show that defendant served time for aggravated assault conviction but which do not reveal crime for which defendant's probation was revoked is not ground for reversal of death sentence where inference that defendant has committed another unnamed crime could not have prejudiced him in any way differently from his own admission from witness stand of convictions for aggravated assault, grand larceny, and cattle theft. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).



Mug shot is admissible in penalty phase of capital murder prosecution to prove that defendant has been convicted of prior offense under another name; evidence consisting of mug shots and prior statements of defendant regarding use of another name and of copies of bill of information and of court minutes showing conviction under other name is sufficient to permit jury to consider prior conviction as aggravating circumstance in penalty phase of capital murder prosecution. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

Prosecuting attorney adequately discloses to defense counsel intent to introduce prior convictions during penalty phase of capital murder prosecution where defense counsel is given copy of defendant's rap sheet and is informed that state will be engaged in ongoing effort to obtain record of prior conviction. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

Limitation in this section on use in sentencing phase of capital case of prior convictions for purpose of establishing aggravating circumstances in no way alters established rule of evidence (§ 13-1-13) under which defendant who testifies may have credibility impeached by prior convictions, whether misdemeanors or felonies. *Mhoon v. State*, 464 So. 2d 77 (Miss. 1985).

In a prosecution for capital murder the trial court properly admitted evidence of defendant's suspended sentence for a non-violent crime as proof that the capital murder was "committed by a person under sentence of imprisonment" pursuant to subsection (5)(a) of this section, since the statute is intended to cure recidivism, and enhanced punishment relates to the conduct underlying the previous convictions. *Evans v. State*, 422 So. 2d 737 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 314 (1983).

In a prosecution for capital murder, the trial court did not err in allowing the state to present evidence of convictions secured subsequent to the indicted offense upon a retrial of the case, which evidence was introduced during the sentencing phase of

the retrial; under this section, evidence of a conviction secured between the time of the capital offense and the time of trial is admissible to show aggravating circumstances. Nor was it error to use the same jury at both the guilt phase and the sentencing, since this section provides for the use of the same jury, and since there was no objection to the procedure or request for another jury to hear the sentencing phase. *Reddix v. State*, 381 So. 2d 999 (Miss. 1980), cert. denied, 449 U.S. 986, 101 S. Ct. 408, 66 L. Ed. 2d 251 (1980), habeas corpus granted, 554 F. Supp. 1212 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 728 F.2d 705 (5th Cir. 1984), reh'g denied, 732 F.2d 494 (5th Cir. 1984), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), on subsequent appeal, 547 So. 2d 792 (Miss. 1989).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice (§ 99-19-105), and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

In a prosecution for capital murder, the trial court properly admitted evidence of a conviction for armed robbery that was entered after the indictment for murder as evidence of aggravating circumstances in the sentencing phase of the trial. Under this section, a conviction entered against a defendant between the time that a capital offense was committed and the time of trial may be admitted into evidence as an aggravating circumstance. *Rigdon v. Rus-*



sell Anaconda Aluminum Co., 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

A prior conviction of another capital offense or of a felony involving the use or threat of violence to the person is admissible at the punishment stage of a trial for a capital crime as an aggravating circumstance to be considered by the jury in determining punishment. *Gray v. State*, 351 So. 2d 1342 (Miss. 1977).

#### **10. —Contemplation that lethal force would be used.**

Where the jury finds § 99-19-101(7)(d) “contemplation” alone, the jury is required to find that the defendant had some sort of “pre-crime,” “contingent intent,” or plan that establishes a mental state beyond mere foreseeability or reckless indifference to human life; a jury instruction that fails to properly instruct the jury on the mental state required, is erroneously given. *Randall v. State*, 806 So. 2d 185 (Miss. 2001).

There was sufficient evidence from which the jury could reasonably conclude that the defendant contemplated the use of lethal force where there was evidence placing the defendant in the victims’ home on the night of their murders, and there was physical evidence that the victims were bound. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a prosecution for capital murder committed while engaged in the commission of armed robbery, the evidence was sufficient to support the jury’s finding pursuant to subsections (3)(a) and (7)(d) of this section that the defendant “contemplated that lethal force would be used” where the defendant’s confession revealed that he willingly and knowingly accompanied his codefendant, who committed the killing, to a store with the specific intent to commit a robbery, the defendant was aware of the fact that the codefendant brought along a shotgun with shells which he stated was needed “for security,” the defendant watched as the codefendant entered the store with the loaded shotgun, and the defendant then entered the store at the codefendant’s request. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).

In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev’d on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

#### **11. Kill, attempt to kill, or intend to kill.**

Assuming *arguendo* that defendant’s argument that the sentencing instruction was improper as it only required the jury to find that he contemplated that lethal force would be used, defendant could not demonstrate the requisite cause and actual prejudice to overcome the procedural bar due to raising the issue for the first time on appeal as the jury clearly found that defendant intended that the victim be killed. *Walker v. State*, 863 So. 2d 1 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004).

The jury was properly permitted to consider the death penalty since there was evidence both that the defendant killed the victim and that he intended to do so where (1) the defendant told a witness that “I’ve killed and I’ll kill again,” and (2) the jury saw pictures of the victim and heard the testimony of the pathologist, showing extensive trauma, how she was tied up, and how her mouth was taped. *Humphrey v. State*, 759 So. 2d 368 (Miss. 2000).

Evidence was sufficient as a matter of law to prove that the defendant either actually killed the victim, intended that a killing take place, or contemplated the use of lethal force where the record revealed

(1) that the defendant was more than likely the instigator of the robbery that led to the victim's death, as well as the one who planned it, and (2) that both defendants were armed on the day of the robbery and that the defendant knew that the codefendant had a gun. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

A verdict contained an individual finding that the defendant actually killed and intended to kill the victim and that he contemplated that lethal force be employed, notwithstanding that the verdict used the word "defendants," rather than "defendant," where the verdict stated the required finding "as to the defendant." *Smith v. State*, 724 So. 2d 280 (Miss. 1998).

Though jury was required to find existence of each of the death penalty aggravating circumstances beyond a reasonable doubt, there was no requirement that jury actually write the words "beyond a reasonable doubt" in its verdict. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors, relating to circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Jury's finding that defendant "intended that a killing take place," which allowed imposition of death penalty, was sup-

ported by evidence that defendant gave guns to 2 accomplices, even though accomplices testified that while planning robbery, they had discussed that victim should not be hurt. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

There was sufficient evidence from which the jury could reasonably conclude that the defendant intended to kill where there was evidence placing the defendant in the victims' home on the night of their murders, and there was physical evidence that the victims were bound. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A jury's sentencing verdict did not fail to meet the requirements of subsection (7) of this section where the verdict stated (1) that the defendant actually killed the victim; (2) that the defendant attempted to kill the victim; (3) that the defendant intended that the killing of the victim take place or; (4) that the defendant contemplated that lethal force would be employed, in spite of the defendant's argument that the verdict's disjunctive form suggested a lack of unanimity on any one particular act, since, under the circumstances of the case, a reasonable juror who found any of the factors could not have failed to find the first factor on the list. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The Weathersby Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and Weathersby considerations are no longer applicable. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).



In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

Admission by murder defendant that accomplice told him that accomplice wanted victim held and that defendant supplied accomplice with murder weapon after disabling victim establishes requisite personal culpability of defendant for imposition of death penalty. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3201, 96 L. Ed. 2d 688 (1987).

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

Evidence that father and 16 year old son committed murder is sufficient to show that father either intended to kill victim or actually committed acts leading to victim's death, as required for imposition of death sentence. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

## 12. Habitual offender status, generally.

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83, was of little or no effect. *Clark v. State*, — So. 2d —, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. Nov. 7, 2006).

In the sentencing phase of a capital murder prosecution, the court's refusal to allow the defendant to inform the jury about his ineligibility for parole as a habitual offender was error even though the court had not yet adjudicated his habitual offender status. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence,



meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. *Hoover v. State*, 552 So. 2d 834 (Miss. 1989).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. *Mhoon v. State*, 464 So. 2d 77 (Miss. 1985).

### 13. —Hearing.

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. *Hoover v. State*, 552 So. 2d 834 (Miss. 1989).

### 14. Mitigating factors, generally.

In a capital murder case, as defendant's case was before the trial court for the sole purpose of sentencing, the trial court properly refused a mitigating instruction which pertained to the question of defendant's guilt in a killing for which he had already been convicted; defendant was not entitled to an instruction on residual doubt as to his guilt at his resentencing trial. *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

Appellant could not rely on Miss. Code Ann. § 99-19-101(6) to support her claim that her counsel had inadequately represented her in failing to investigate and present mitigating evidence during her sentencing hearing on her conviction for arson because § 99-19-101(6) concerned mitigating evidence presented to a jury in capital cases. Arson was not a "capital crime" as defined by Miss. Code Ann. § 1-3-4 because § 1-3-4 limited capital crimes to crimes punishable by death or imprisonment for life in the state penitentiary, and the maximum punishment for arson was 20 years in the penitentiary under Miss. Code Ann. § 97-17-1 (Rev.). *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

The trial court erred by excluding testimony that a mental health center had failed the defendant, which would have included testimony that the defendant's older brother had also fared badly in life, but that his younger brother had done much better because the mental health facility was more competent by the time he arrived there. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

The defendant could not complain that he was not afforded the opportunity to instruct the jury to consider his impoverished and traumatic childhood as mitigating factors where the court gave the jury the general catch-all instruction. *Smith v. State*, 724 So. 2d 280 (Miss. 1998).

The court rejected the argument that the burden of proof is shifted by requiring that the mitigating circumstances outweigh the aggravating circumstances. *Crawford v. State*, 716 So. 2d 1028 (Miss. 1998), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458 (1998).

State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for sentence less than death, even if all jurors agree that mitigating circumstance exists, unless jurors unanimously find existence of same mitigating circumstance. *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), on remand, 326 N.C. 592, 391 S.E.2d 815 (1990), on remand, 327 N.C. 31, 394 S.E.2d 426 (1990).

Refusal to require prosecution, at resentencing in capital rape-murder case in which victim's numerous injuries included stab wound, to disclose victim's criminal history with respect to use of knives was not Brady violation, though such information was allegedly relevant to mitigator of consent or participation by victim; omission did not create reasonable probability of changing outcome, since even if victim engaged in knifeplay with defendant, it was not logical that she would have consented to having pair of underwear stuffed into throat or would have helped

defendant to hit her with sufficient force to fracture her skull. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Prosecutor's alleged misstatement of law by mischaracterizing defense position at capital sentencing proceeding as trying to prove that defendant was so drunk that he did not know what he was doing at time of rape and murder, when defendant was actually trying to establish mitigating circumstance of inability to appreciate criminality of his conduct or to conform his conduct to requirements of law, was cured by jury instruction that correctly defined the mitigator. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Denial of instruction, proposed by defendant at capital sentencing proceeding, that jury was required to find a mitigating circumstance if it was proven by preponderance of evidence, was not error; instruction on mitigating factors did not have to give exact burden of proof. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Where sentencer is not permitted to consider all mitigating evidence, there is a risk of erroneous imposition of death sentence, and case will be remanded for resentencing. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Harshness of life sentence in state prison is no way related to capital murder defendant's character, his record, or circumstances of crime, and therefore, it was properly excluded in sentencing phase. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Testimony from defendant's family that they wished for his life to be spared was not relevant to defendant's character, record, or circumstances of offense and



was properly excluded at capital murder sentencing trial. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

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Sentencer may not be precluded from considering as mitigating factor any aspect of defendant's character or record or any circumstance of offense that defendant proffers as a basis for sentence less than death; defendant is entitled to individualized consideration of his character, his record, and his crime. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

"Catch-all" mitigating circumstance instruction adequately afforded jury opportunity to consider remorse as mitigating factor during sentencing phase of capital murder case. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant, in resentencing phase of capital murder trial, is not collaterally estopped from introducing mitigating evidence, but in resentencing the only admissible evidence is evidence of aggravating and mitigating factors, and retrial of issues relating only to guilt is not permitted. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Statute stating that evidence may be presented in capital murder proceeding as to any matter that court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating

circumstances applies even if it is necessary for another jury to determine the issue of penalty. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In capital murder prosecution in which instruction required unanimous finding beyond reasonable doubt of aggravating circumstances, it could not reasonably be inferred that silence of instruction as to finding mitigating circumstances would likely cause jury to assume that unanimity was also the requirement for mitigating circumstances. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Jury in capital murder case did not have to be specifically instructed that mitigating circumstances were to be found individually and not unanimously before being considered in weighing process. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor would fall under "catch-all" mitigating circumstance. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme re-



morse for crimes committed. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant was not entitled to have listed as mitigating circumstance the fact that none of her 3 accomplices had received death penalty; jury was aware that none of her accomplices had received death penalty, and trial court informed jury that it should not limit its consideration to those mitigating circumstances listed. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Submission to a capital sentencing jury of the mitigating factor that the defendant had no "significant" history of criminal activity was not improper, in spite of the defendant's argument that the factor was unconstitutionally applied in his particular case because it implied that he had at least some criminal history when in fact he had none, where the mitigating factor was taken verbatim from the list provided by the legislature to be considered in imposing sentence, and the defendant had the opportunity during closing argument to dispel any notion the jury might have had that he had a history of criminal activity. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124

(Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A capital sentencing jury's failure to provide a written list of all the mitigating circumstances it found in its deliberation did not constitute reversible error; subsection (3) of this section does not entitle a defendant to have any mitigating circumstances the jury may have considered individually listed. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A sentencing jury's failure to make written findings as to mitigating circumstances did not require reversal of a death sentence; § 99-19-103 requires a written enumeration of aggravating circumstances only, and this section has never been read to require an express written list of all the mitigating circumstances which members of the jury may find extant and such a list would often be impracticable because the law requires no consensus among jury members regarding mitigating factors. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

New sentencing hearing was required where trial court had excluded relevant mitigating evidence about method for generating electricity from alternative energy source, defendant had been in contact with Tennessee Valley Authority over this invention, had entered into agreement with them about it, and witness was familiar with all details and would testify about them. *Jordan v. State*, 518 So. 2d 1186 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death

sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked this section in listing the mitigating factors which the jury could consider. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Convicted capital murder defendant is not entitled, during sentencing phase of prosecution, to have jury consider, as relevant mitigating circumstance, that accomplices have received verdicts of life imprisonment from juries in separate capital murder trials. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

In a prosecution for capital murder committed during a robbery, the trial court erred when it instructed the jury that it was precluded from considering nonstatutory mitigating factors in determining whether to impose the death penalty. *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), reh'g denied, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S. Ct. 2021, 72 L. Ed. 2d 474 (1982).

#### 15. —Retarded, low IQ, or diminished capacity.

Evidence at sentencing phase of capital murder case was sufficient to support finding that aggravating circumstances outweighed any mitigating circumstances

based on defendant's mild mental retardation and alleged mental or emotional disturbance at time of crime, and supported imposition of death penalty; evidence indicated that defendant was only mildly mentally retarded, that mental retardation alone would not cause extreme emotional disturbance and that defendant's actions after killing victim were inconsistent with mental "snap" or true mental illness. *Wells v. State*, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

Defendant was not entitled to diminished capacity instruction in capital murder case, even though doctor testified that defendant's substance abuse problem caused him to suffer "a diminished cerebral activity, cerebral ability" at time of crime; there was no evidence that defendant was substantially impaired in his capacity to appreciate criminality of his conduct and to conform his conduct to requirements of the law. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239 (Miss.



1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err by excluding mitigating evidence in the form of testimony from the defendant's sister regarding incidents when the defendant "heard voices" where a proper foundation was not laid in that the trial court had no reason to believe that the witness had any independent knowledge of the events aside from her brother's telling her about them, the record was devoid of any medical testimony indicating that the defendant was schizophrenic at the time of the murder, and no medical experts testified on the defendant's behalf. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

Death sentence for mentally retarded accused was not categorically prohibited by Eighth Amendment, but accused is entitled to instruction as to mitigating effect of mental retardation and childhood abuse. *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), on remand, 882 F.2d 141 (5th Cir. Tex. 1989).

In prosecution for murder, where defendant presented evidence that his IQ was about 70, that he was a slow learner, that he scored low on achievement tests, and that he had sustained a head injury sev-

eral years prior to the commission of the crime, but where evidence was also presented that, thereafter, he returned to school and excelled in carpentry work, and that he went on to graduate and got a college football scholarship, the court held that, on the basis of this evidence, there was nothing presented which would have warranted an instruction on the defendant's capacity to "appreciate the criminality of his conduct," as required by this section, at the time the murder took place. *In re Hill*, 460 So. 2d 792 (Miss. 1984).

In a prosecution for capital murder, the trial court properly refused an instruction permitting the jury to consider defendant's diminished capacity to appreciate the criminality of his conduct, pursuant to subsection (6)(f) of this section, in the absence of any expert testimony suggesting that defendant was mentally retarded or that he was suffering from a mental disorder, disease or defect. *Williams v. State*, 445 So. 2d 798 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985).

#### 16. —Age or character.

Prosecutor's comment on capital murder defendant's voluntary drug use to rebut mitigating circumstance of no significant history of criminal activity did not violate defendant's right to fair trial, where defendant placed his prior criminal activity at issue. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant's age at time she would be eligible for parole, if given life sentence, was speculative. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Imposition of death penalty for crimes committed at age 16 or 17 is not mode or act of punishment that was considered cruel and unusual at time Bill of Rights was adopted, and there is no modern national consensus forbidding imposition of death penalty for crimes committed at



those ages. *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), reh'g denied, 492 U.S. 937, 110 S. Ct. 23, 106 L. Ed. 2d 635 (1989).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *West v. State*, 519 So. 2d 418 (Miss. 1988).

In granting a new trial on the sentence phase for a 16 year old female convicted of homicide, appellate court would note that defendant's age remained a mitigating factor to be considered by the jury under this section. *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351 (1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366 (1985).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice (§ 99-19-105), and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

### 17. Closing argument.

Prosecutor's comment in closing argument in resentencing in capital case, that there had been nothing wrong with defendant's IQ in one intelligence test, was fair comment on evidence offered by defendant to demonstrate mitigator of inability to comprehend criminality of his conduct, where test relied upon by defendant's ex-

pert witness indicated that defendant's IQ was in normal range. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Prosecutor's closing argument in capital sentencing proceeding, in which he highlighted apparent contradiction between brain scans and EEG reports finding defendant normal and testimony of defense psychologist that his tests showed brain dysfunction, was not precluded by psychologist's testimony that there was no contradiction because the tests measured two different things; prosecutor's statements were based on fact, and prosecutor could offer his theory that brain scans and EEG results showed defendant to be normal despite psychologist's tests. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Prosecutor's comment in closing argument at capital sentencing proceeding, that the only witness to rape-murder, namely, the victim, was killed, was not improper comment on defendant's decision not to testify; statement was made in direct response to defense counsel's question to jury as to why defendant had not killed two others present in house at the time of offenses if his object was to prevent apprehension. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Prosecutor's statement in closing argument at resentencing in capital murder proceeding, that the forensic evidence was unquestionable, did not constitute improper comment on defendant's decision not to testify; argument was made in response to closing argument by defense. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Defendant waived review of claim that prosecution seized on evidence presented by murder victim's daughter concerning victim's personal characteristics to make impermissible arguments for imposing death penalty by failing to object during argument, despite his objection during victim's daughter's testimony. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that

matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly suggest that it was the State Supreme Court, rather than the jury, that had the responsibility of imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defense counsel's comments that Charles Manson murders were more grie-

some than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A trial court's limitation of closing argument to 15 minutes in the sentencing phase of a capital murder prosecution did not violate the defendant's constitutional right to a fair trial where the defendant made no proffer as to what he would have argued had he been given additional time, and he raised no objection to the time limit at the time of trial. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).



In the sentencing phase of a capital murder prosecution, the trial judge abused his discretion in denying the defendant's request for 25 minutes for closing argument and granting him 15 minutes "to the side." A defendant must be allowed, within reason, whatever time he or she believes is necessary to seek a penalty less than death, and the defendant's request for 25 minutes was within reason. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

### 18. Jury instructions, generally.

Based on jury instructions given and the written verdict delivered in defendant's capital murder case, it was clear that the jury had followed the instructions on the burden of proof applying to a finding of aggravating circumstance, although there was no requirement that the verdict be "beyond a reasonable doubt," and there was no violation of *Apprendi* or *Ring*; further, the transcript of the verdict clearly indicated that it had been unanimous, and in compliance with Miss. Code Ann. §§ 99-19-101 and 99-19-103. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

In defendant's capital murder conviction where defendant was sentenced to death, because Miss. Code Ann. § 47-7-3(1)(f) denied parole eligibility to any person charged, tried, convicted, and sentenced to life imprisonment under the provisions of Miss. Code Ann. § 99-19-101, the trial court did not err in not instructing the jury on life imprisonment with the possibility of parole. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

In a capital murder case, the aggravating circumstances instruction complied with Miss. Code Ann. § 99-19-101(7), circumstantial evidence language was not required in charging the jury as to the statutory requirements, and sufficient evidence supported an instruction pursuant to § 99-19-101(5)(e) on preventing a lawful arrest as an aggravating factor. *Lynch v. State*, 877 So. 2d 1254 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1299, 161 L. Ed. 2d 122 (2005).

There was no violation of the Eighth Amendment to the United States Constitution when the trial court instructed the jury that the procedure it was to follow was not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances, but that it was required to apply reasoned judgment as to whether the situation called for life imprisonment without parole, life imprisonment, or whether it required the imposition of death, in light of the totality of the circumstances present; such instruction did not permit the jury to substitute its own judgment in place of the statutory scheme or to ignore the elements of aggravation and mitigation or to set them aside in favor of their own subjective feelings about the proper sentence. *Goodin v. State*, 787 So. 2d 639 (Miss. 2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481 (2002).

In a prosecution for capital murder, the court did not err in not instructing the jury with regard to a sentence of life imprisonment with the possibility of parole; the earned time allowance and parole statutes effectively eliminate the possibility of parole for someone convicted of capital murder. *Puckett v. State*, 737 So. 2d 322 (Miss. 1999).

An instruction that "the court instructs the jury that it must be emphasized that the procedure you must follow is not a mere counting process or a certain number of aggravating circumstances versus the number of mitigating circumstances, rather, you must apply your reason to judgment as to whether this situation calls for life imprisonment or whether it requires the imposition of death in light of the totality of the circumstances present" did not instruct the jury to consider other non-statutory aggravating factors and, instead, merely informed the jury on the manner in which they were to evaluate those aggravating circumstances which they could consider under the statute. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

The trial court did not commit reversible error when it instructed the sentencing jury that it could consider the "detailed circumstances of the offense for



which the defendant was convicted.” *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

The failure of the court to instruct the jury that it must make written findings of mitigation was not reversible error since the statute does not require an express written list of all of the mitigating circumstances which members of the jury might find extant. *Bell v. State*, 725 So. 2d 836 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805 (1999).

Refusal to give instruction that defendant had declined to testify at capital sentencing proceeding because of being inarticulate, as part of instruction on defendant’s right not to testify, was proper where there was no evidence presented of defendant’s being inarticulate or ill-at-ease around a jury, and no evidence indicating that any brain impairment or dysfunction he might have would adversely affect his ability to testify. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Mississippi case law will not permit an instruction without credible evidence supporting its premise. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Defendant’s proposed jury instruction, which asserted as fact an entirely speculative matter regarding sentencing for a second murder, was confusing and misleading and properly refused. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh’g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh’g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Jury instruction that all twelve jurors had to agree on verdict before verdict could be returned into court, when read with another instruction which made clear the option jury had in returning to courtroom, properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh’g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh’g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

When read as a whole, instructions properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment, where court instructed “that all 12 jurors must agree on the verdict before the verdict can be returned into Court,” and also made it clear that jury’s options were to return verdict of death, return verdict of life imprisonment, or report their inability to agree on a verdict, despite claim that instructions failed to clarify that if, within a reasonable time, jury failed to agree unanimously, it must cease deliberations and report its findings to the court. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh’g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh’g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Trial court did not improperly speculate on parole in capital murder case by telling venire about possibility of parole should defendant be sentenced to life in prison; trial court emphasized that court and jury had no control over parole, when further pressured by venire regarding parole eligibility, court gave truthful response, and at close of presentation of evidence, court properly instructed jury regarding options of life and death. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh’g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue, which was raised or should have been raised at trial or in direct appeal, as to whether defense counsel’s failure to object to aggravating circumstances at penalty phase constituted ineffective assistance of counsel; procedural bar applied to aggravating circumstances, which did not get special treatment. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Defendant charged with capital murder was not entitled to presumption at sentencing phase that life was appropriate punishment. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh’g denied, 691 So. 2d

1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

"Catch-all" mitigating circumstance instruction adequately afforded jury opportunity to consider remorse as mitigating factor during sentencing phase of capital murder case. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant was not entitled to jury instruction during sentencing phase of capital murder case informing jury that execution would be by lethal injection if he were sentenced to death. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Murder defendant was procedurally barred from raising, on appeal from resentencing, failure to give jury instruction setting forth the elements of the underlying offense of kidnapping as an aggravating factor where defendant did not object to sentencing instruction on that ground in trial court. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Jury in resentencing phase of capital murder prosecution did not have to be instructed on elements of capital murder, murder and kidnapping in order to find beyond reasonable doubt existence of aggravating circumstance that murder was committed during kidnapping, though it would have been optimum situation to include such instruction; omission of kidnapping instruction in resentencing phase was cured by original jury's convicting defendant of murder and kidnapping. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Jury in resentencing phase of capital murder trial did not have to "re-find" elements of murder or kidnapping in finding aggravating circumstance of murder during kidnapping, but could rely on prior finding made by jury during guilt-finding phase. *Williams v. State*, 684 So. 2d 1179

(Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In sentencing phase of capital trials, statutory aggravating circumstances must be unanimously found beyond a reasonable doubt. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In capital murder prosecution, giving of instruction on mitigating circumstance, that victim was participant in defendant's conduct or consented to act, was not improper or prejudicial as lacking factual basis or because jury would assume that defendant offered the mitigating circumstance, in case dealing with both consensual and forced sexual intercourse, consensual and forced movement from one location to another, and voluntary consumption by victim of drugs and intoxicants. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Jury in capital murder case did not have to be specifically instructed that mitigating circumstances were to be found individually and not unanimously before being considered in weighing process. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).



It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

The court did not err when it instructed the jury that it could consider "the detailed circumstance of the offense." *Doss v. State*, 709 So. 2d 369 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consensus on mitigating circumstances is required. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in further deliberations. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. *Blue v. State*, 674 So. 2d 1184 (Miss.

1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Whimsical or residual doubt instructions are not required as a mitigating circumstance in death penalty cases. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defendant would be executed by lethal injection if sentenced to death. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court did not violate Eighth Amendment rights of capital murder defendant by refusing to give sentencing phase instruction that court was obligated to consider mitigating factors which in fairness, sympathy and mercy to defendant extenuate or reduce degree of blame or punishment. *Walker v. State*, 671 So. 2d



581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not

err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73—the statute under which the defendant pled guilty—defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in

arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

Juries must be instructed that the findings that must be made by a jury in order to impose a death sentence, under subsection (7) of this section, must be made beyond a reasonable doubt. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his

prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked this section in listing the mitigating factors which the jury could consider. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Jury instruction in penalty phase of capital murder prosecution which follows language of this section and § 99-19-103 need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

In a capital murder prosecution in which defendant was sentenced to death under this section and § 99-19-103, the trial court did not err in refusing to instruct the jury that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. *Hill v. State*, 432 So. 2d 427 (Miss. 1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983), habeas corpus granted, 667 F. Supp. 314 (N.D. Miss. 1987), aff'd in part, rev'd in part, 887 F.2d 513 (5th Cir. 1989), opinion supplemented on denial of reh'g, 891 F.2d 89 (5th Cir. 1989), vacated, 498 U.S. 801, 111 S. Ct. 28, 112 L. Ed. 2d 6 (1990), on remand, 920 F.2d 249 (5th Cir. 1990), post-conviction relief granted, 659 So. 2d 547 (Miss. 1995), reh'g denied, (Miss. 1995).

### 19. —Limiting instruction.

Limiting instruction is not required with respect to jury's consideration of evidence concerning aggravating circumstance of committing murder in order to avoid arrest. *Holland v. State*, 705 So. 2d



307 (Miss. 1997), reh'g denied, 706 So. 2d 525 (Miss. 1998).

"Heinous, atrocious, or cruel" instruction in capital murder prosecution must be accompanied by appropriate limiting instruction. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Instruction defining "heinous, atrocious, or cruel" murder as one "accompanied by such additional acts as to set the crime apart from the norm of capital murders—the conscienceless of pitiless crime which is unnecessarily torturous to the victim" was sufficient, even though instructions also stated that "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Jury instruction during sentencing phase of capital murder trial sufficiently limited jury's consideration of "heinous, atrocious or cruel" aggravating circumstance and was not unconstitutionally vague or overbroad. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Instruction on aggravating factor for death penalty purposes that capital offense was especially heinous, atrocious or cruel was not unconstitutionally vague, as instruction set out definitions of the terms, and provided examples. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Instruction on aggravating factor for death penalty purposes that murder was especially heinous, atrocious or cruel was not inadequate on ground that it failed to

speak exclusively to defendant's moral culpability, allegedly told jury that defendant had in "fact" used method of killing that caused serious mutilation, or because "heinous, atrocious, or cruel" is disjunctive rather than conjunctive. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Capital sentencing instruction concerning "especially heinous, atrocious, or cruel" aggravating circumstance adequately channelled jury's discretion and thus was not unconstitutional, despite fact that part of instruction was invalid under *Shell*. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss.



1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in *Maynard v. Cartwright* (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, *Clemons v. Mississippi* (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and *Maynard* and *Clemons* did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; *Clemons* decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to *Clemons* decision that decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1

(1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Where, in sentencing hearing which ended in jury determination that accused should receive death penalty, court instructed jury that, in considering whether murder was "especially heinous, atrocious, or cruel" within meaning of statutory aggravating factors, "heinous" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile," and "cruel" meant "designed to inflict a high degree of pain with indifference to, or even enjoyment of, a suffering of others," U.S. Supreme Court reversed state Supreme Court judgment insofar as it relied on "heinous, atrocious, or cruel" aggravating factor, and remanded case for further consideration, holding that limiting instruction used by trial court was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

It was not improper for aggravating circumstance described in subsection (5)(h) of this section ("especially heinous, atrocious, or cruel" offense) to be submitted to jury without limiting instruction, where defendant, during course of robbery, had ordered grocery store clerk to kneel and had shot him in head from distance of approximately 3 or 4 feet prior to leaving store, particularly where this circumstance was one of several statutory aggravating circumstances relied on by State and found by jury. *Evans v. Thigpen*, 631 F. Supp. 274 (S.D. Miss. 1986), aff'd, 809 F.2d 239 (5th Cir. 1987), reh'g denied, 814 F.2d 658 (5th Cir. 1987), cert. denied, stay denied, 483 U.S. 1033, 107 S. Ct.

3278, 97 L. Ed. 2d 782 (1987), reh'g denied, 483 U.S. 1036, 108 S. Ct. 6, 97 L. Ed. 2d 795 (1987).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in *Coleman v. State* (Miss. 1979) 378 So. 2d 640.

## 20. —Beyond a reasonable doubt.

"Beyond a reasonable doubt" is not the burden on the process of weighing mitigating circumstances against aggravating circumstances under Miss. Code Ann. § 99-19-101(2)(c) and (3)(c) in a capital murder case. The majority rule is that jurors are required to find the existence of each aggravating circumstance beyond a reasonable doubt, but the jury is not required to find that the aggravating circumstances beyond a reasonable doubt outweigh the mitigating circumstances following the statute. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

In sentencing phase of capital trials, statutory aggravating circumstances must be unanimously found beyond a reasonable doubt. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In capital murder prosecution in which instruction required unanimous finding beyond reasonable doubt of aggravating circumstances, it could not reasonably be inferred that silence of instruction as to finding mitigating circumstances would likely cause jury to assume that unanimity was also the requirement for mitigating circumstances. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

The "beyond a reasonable doubt" standard of proof applies in the sentencing phase of capital trials. Capital sentencing juries have no authority to find statutory aggravating circumstances unless such "unanimously be found beyond a reason-

able doubt." *White v. State*, 532 So. 2d 1207 (Miss. 1988).

In the sentencing phase of a capital murder charge, where the reasonable doubt instruction has been given, there is no error in failing to instruct that every reasonable doubt the jury may have regarding any evidence in the case must be resolved in favor of the accused and against the state. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

## 21. —"Mercy" instruction.

The trial court committed reversible error in a murder prosecution when it instructed the jury that "you . . . must not consider sympathy as part of this case" and "sympathy [can] have no part in your deliberations;" the belief that jurors could erase the natural human considerations that underlie their decisions would be naive, and to insist that they do so is futile and erroneous. *King v. State*, 784 So. 2d 884 (Miss. 2001).

Instruction that jury in capital sentencing proceeding could not be influenced or swayed by bias, sympathy, or prejudice did not totally shut off consideration of sympathy and therefore was in accord with both state and federal caselaw. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Trial court had discretion whether to grant defendant's requested "mercy" instruction during sentencing phase in capital murder case. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So.



2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A capital murder defendant is not entitled to a "mercy" instruction. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Although no reversible error is committed in failing to instruct that jury may grant accused mercy even though it finds insufficient mitigating circumstances to outweigh the aggravating circumstances, the granting of such mercy instruction would further refine and direct the jury's discretion in sentencing between those cases in which the death penalty is given and those in which it is not. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

## 22. Cruel and unusual punishment.

Defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where it was not imposed under the influence of passion, prejudice, or any other factor; evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances; it was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed; and the jury did not consider any invalid aggravating circumstances. Additionally, many of defendant's complaints about various statements were procedurally barred for the failure to make a contemporaneous objection. *Rubenstein v. State*, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005).

Defendant was not entitled at capital sentencing proceeding to mercy instruction stating that jury could impose life imprisonment even without mitigating factors. *Holland v. State*, 705 So. 2d 307



(Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Death sentence imposed in rape-murder case was not excessive or disproportionate to penalty imposed in similar cases, where crime involved shooting victim four times, asphyxiating her by stuffing panties down her throat and by tying shirt around her neck, delivering skull-crushing blow, and inflicting genital and rectal injuries over a period of at least 45 minutes, and where defendant, though assertedly suffering from brain dysfunction, had normal brain scans and an average IQ and did not contend he did not know right from wrong. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Defendant could not assert that death penalty violated Eighth Amendment because statutes did not set a minimum age below which child may not be transferred from youth court to circuit court for crimes punishable by death where defendant committed his crime at age 17, an age where it is sufficiently clear that no national consensus forbids imposition of capital punishment. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring

the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation. *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995), reh'g denied, 514 U.S. 1078, 115 S. Ct. 1725, 131 L. Ed. 2d 583 (1995).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by vesting original jurisdiction in the circuit court when a person under 18 years of age is charged with a capital offense, rather than requiring a certification proceeding in youth court for transfer to the circuit court; Mississippi law allows a capital murder defendant who is under the age of 18 years to request a special hearing to consider his or her age, lack of prior offenses, likelihood of successful rehabilitation and other factors which favor sending the case to the youth court rather than continuing in circuit court. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by its failure to explicitly state a minimum age that a person may be subject to the death penalty, since the age at which one may receive a death sentence for the crime of capital murder is implied; no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony. *Foster v.*

State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for sentence less than death, even if all jurors agree that mitigating circumstance exists, unless jurors unanimously find existence of same mitigating circumstance. *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), on remand, 326 N.C. 592, 391 S.E.2d 815 (1990), on remand, 327 N.C. 31, 394 S.E.2d 426 (1990).

State death penalty statute mandating death sentence if jury finds at least one aggravating circumstance and no mitigating circumstances satisfies the requirements of the Eighth Amendment and does not violate Amendment's requirement of individualized sentencing, because presence of aggravating circumstances serves purpose of limiting class of death-eligible defendants, and Amendment does not require that aggravating circumstances be further refined or weighed by jury, rather, requirement of individualized sentencing

in capital cases is satisfied by allowing jury to consider all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990).

Imposition of death penalty for crimes committed at age 16 or 17 is not mode or act of punishment that was considered cruel and unusual at time Bill of Rights was adopted, and there is no modern national consensus forbidding imposition of death penalty for crimes committed at those ages. *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), reh'g denied, 492 U.S. 937, 110 S. Ct. 23, 106 L. Ed. 2d 635 (1989).

Death sentence for mentally retarded accused was not categorically prohibited by Eighth Amendment, but accused is entitled to instruction as to mitigating effect of mental retardation and childhood abuse. *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), on remand, 882 F.2d 141 (5th Cir. Tex. 1989).

Application of state death penalty statute to homicide defendant who was 15-years-old at time of offense, following trial as adult which resulted in conviction of first-degree murder, violates cruel and unusual punishment clause of Eighth Amendment, according to plurality of U.S. Supreme Court. *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), on remand, 762 P.2d 958 (Okla. Crim. App. 1988).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3201, 96 L. Ed. 2d 688 (1987).

Miss. Code § 97-3-21 and this section are not unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within



their proper discretion. *Smith v. State*, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983), habeas corpus denied, 689 F. Supp. 644 (S.D. Miss. 1988), aff'd, 904 F.2d 950 (5th Cir. 1990), reh'g denied, 912 F.2d 1465 (5th Cir. 1990), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 503 U.S. 930, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992), on remand, 970 F.2d 1383 (5th Cir. 1992), post-conviction relief granted, 648 So. 2d 63 (Miss. 1994).

This section does not impose cruel and unusual punishment. Nor does it unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since there is no requirement that the jury impose death when aggravating circumstances are shown and mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, this section is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially heinous, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. *Coleman v. State*, 378 So. 2d 640 (Miss. 1979).

### **23. Invalid or improper aggravating circumstance.**

Death-sentenced Mississippi inmate was not entitled to federal habeas relief under 28 U.S.C.S. § 2254 following his murder for hire conviction; although the introduction of a prior Texas statutory rape conviction as a prior violent felony aggravating factor under Miss. Code Ann. § 99-19-101(5)(b) was improper, the error

was harmless. Considering the entire record, the absence of any significant mitigating circumstances, the presence of two valid aggravating circumstances, and the Brecht standard, there was no reasonable possibility that the erroneous submission of the prior violent felony aggravator during the punishment phase substantially affected or influenced the jury. *Nixon v. Epps*, 405 F.3d 318 (5th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 650, 163 L. Ed. 2d 528 (2005).

Defendant in capital case failed to demonstrate substantial need at resentencing for neurological exam to determine brain damage that would support mitigating circumstance of inability to appreciate criminality of conduct, where affidavit of forensic psychologist submitted by defendant contained no diagnosis that defendant was suffering from any mental disorder whatsoever. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue, which was raised or should have been raised at trial or in direct appeal, as to whether defense counsel's failure to object to aggravating circumstances at penalty phase constituted ineffective assistance of counsel; procedural bar applied to aggravating circumstances, which did not get special treatment. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally vague sentencing instruction defining the "especially heinous" aggravating circumstance. *Davis v. State*, 655 So. 2d 864 (Miss. 1995).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" ag-



gravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). *Smith v. State*, 648 So. 2d 63 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993); *Stringer v. State*, 638 So. 2d 1285 (Miss. 1994).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Wiley v. State*, 635 So. 2d 802 (Miss. 1993).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as this section, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. *Wilcher v. State*, 635 So. 2d 789 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling *Johnson v. State* (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) *Johnson v. State*, 547 So. 2d 59

(Miss. 1989), but see *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance—which was found to be unconstitutionally vague—or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

Even if the trial judge improperly admitted evidence of the defendant's prior armed robbery conviction during the sentencing phase of his trial, the sentence of death would be affirmed where there were 3 other aggravating circumstances found by the jury pursuant to subsection (5) of this section. *Cabello v. State*, 524 So. 2d 313 (Miss. 1988).

#### **24. —Appellate court's right to reweigh.**

In a state where capital sentencing procedures require the sentencing jury to weigh aggravating circumstances and

mitigating factors in order to determine the propriety of a death sentence, an automatic rule by which an appellate court would affirm a death sentence—even though that sentence was based in part on an aggravating circumstance that is found to be invalid—so long as there remained at least one valid aggravating circumstance, would itself be invalid under the Federal Constitution, for such a rule would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).



The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance—which was found to be unconstitutionally vague—or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. *Clemons v. Mississippi*, 494 U.S.

738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling *Johnson v. State* (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) *Johnson v. State*, 547 So. 2d 59 (Miss. 1989), but see *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in *Maynard v. Cartwright* (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, *Clemons v. Mississippi* (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss.) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and *Maynard* and *Clemons* did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final,



U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

## 25. Prosecutor's statements to jury, generally.

It is appropriate for the defense to ask for mercy or sympathy in the sentencing phase. It is equally appropriate for the state to further its goal of deterrence by arguing to "send a message" in the sentencing phase. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

Prosecutor's comment that medical reports on EEGs and brain scans measured the physical body, in response to defense psychologist's cross-examination testimony at capital sentencing proceeding that medical reports indicating defendant was normal did not rebut psychologist's finding of brain dysfunction because psychologist's tests and medical report tests measured different things, was not plain error. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Taken in context, prosecutor's comment to jury at capital sentencing proceeding, that he was chief law enforcement official for three-county area and took his job seriously, was not improper attempt to use his position to achieve more severe sentence; comment came in context of argument that defendant's actions alone, rather than actions of "dysfunctional" family members, were responsible for his being on trial for capital murder. *Holland*

*v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Statement of prosecutor on rebuttal during closing argument in capital sentencing proceeding, that he did not criticize defense counsel because they had "tough job" to defend even against death penalty given the facts of case, did not constitute prosecutorial misconduct deflecting jury's attention from real issues in case, but was proper comment on weakness of defense. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Attorneys are to be given wide latitude in making their closing arguments and, given latitude afforded attorneys during closing argument, any allegedly improper prosecutorial comments must be considered in context, considering circumstances of case, when deciding on their propriety. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for awhile, and statements were made in context of whether people should still believe that justice will prevail. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Statements by prosecutor in closing argument in capital murder case relating to whether jury "had the guts" to impose a death penalty, referring to defendant as an "animal" and stating that if defendant did not receive the death penalty, legislature ought to take it off the books did not constitute reversible error in light of wide latitude generally available to counsel to argue case on closing argument. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert.

denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Comment by prosecutor in resentencing phase of capital murder trial, in response to defense argument that defendant acting alone could not have killed victim in manner described, that defendant could have done it if victim was drunk or had taken drugs, or if defendant had given her drugs, though not recommended, was not so inflammatory as to necessitate trial court's objecting on its own motion or to require finding of error on appeal as arguing facts not in evidence, in case in which the defense first suggested that someone may have put drugs in victim's drink, in attempt to show that she was in altered state and not completely innocent. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Prosecutor did not impermissibly comment upon failure of capital murder defendant to testify when he told jury, following defendant's speech to jury, that "for 11 months [defendant] had wanted to say something" and "if all he had to say was what he said in those less than 2 minutes he stood here before you, I can see why he hasn't bothered until now"; prosecutor's remarks were in direct response to defendant's attempt to show some degree of remorse. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Capital murder defendant was not prejudiced by prosecutor's statement that the only "correct choice" upon conviction was death penalty; trial court instructed that jury must decide whether defendant should be sentenced to death or to life imprisonment, leaving no question that jurors were fully informed of their options, and jurors were presumed to follow law as instructed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly comment on defendant's failure to take the stand during resentencing hearing in capital murder case when he attempted to

question witness about defendant's confession given during his guilt phase testimony; trial court refused to allow prosecution to question witness as to defendant's earlier testimony, and at time, defendant had not informed trial court he would not testify during sentencing phase. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian



burial during his closing argument did not constitute error. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

## **26. —Future crimes, future dangerousness or possibility of parole.**

Prosecutor's comment during closing argument of capital murder case that jury did not know whether defendant's violent actions were "one-time thing" was supported by medical experts' testimony that, if defendant were under influence of alcohol, he could perpetuate another violent crime, that defendant had alcoholic tendencies, and that success rate for recovering substance abusers was very low. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh'g

denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant's propensity for future crimes during the sentencing phase of a capital murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by subsection (5) of this section. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

Prosecutor's introduction of defendant's potential future dangerousness did not go beyond provisions of this section where defense counsel first introduced defendant's potential for future dangerousness and where subsection (5)(b) of this section implicitly poses inquiry into future dangerousness by asking jury to determine whether defendant had been previously convicted of felony involving violence to person. *Gilliard v. Scroggy*, 847 F.2d 1141 (5th Cir. 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 807 (1989), reh'g denied, 489 U.S. 1061, 109 S. Ct. 1332, 103 L. Ed. 2d 600 (1989).

A prosecutor's comments in closing argument during the sentencing phase of a capital case suggesting that prisoners and guards might be in danger if the defendant were to receive a life sentence rather than the death penalty were not improper. *Woodward v. State*, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

A prosecutor's argument in the sentencing phase of a capital case regarding the possibility of the defendant being paroled and the fact that another murder defendant had committed murder after being paroled from a life sentence constituted reversible error. The argument regarding parole introduced an arbitrary factor into the sentencing process proscribed by § 99-19-105(3)(a). *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

## **27. —Finality of decision or appellate process.**

In a capital murder case, a court did not commit error in sending the jury to delib-



erate further where a document retrieved from the jury room trash can was not submitted by the jury to the trial court as a verdict and was not submitted on post-trial motion to the trial court, where the only reason the court of appeals was aware of it was because the defense attorney had it added to the court papers after the trial. Thus, the only verdict actually given to the court was the one sentencing defendant to death. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for awhile, and statements were made in context of whether people should still believe that justice will prevail. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

A prosecutor's mention of appellate review during the sentencing phase of a capital case might well have lessened the jurors' sense of responsibility and therefore constituted reversible error. Furthermore, the prosecutor's insinuation that capital murderers monopolize judicial resources and are coddled by appellate courts may have introduced an arbitrary factor proscribed by § 99-19-105. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. *Williams v. State*, 544 So. 2d

782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), on remand, 481 So. 2d 850 (Miss. 1985), vacated on other grounds, 479 U.S. 1075, 107 S. Ct. 1269, 94 L. Ed. 2d 130 (1987).

## 28. —Victim.

In the sentencing phase of a prosecution for murder, it was not error for the state to note in its closing that injustice would be hard to bear by the family and friends of the victim or to ask the rhetorical question of whether it was justice if the defendant was able to sit in jail reading, sleeping, and watching television. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

References in prosecutor's closing argument in resentencing phase of capital murder case to victim's family, in what could be called victim impact statement, were not improper. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for awhile, and statements were made in context of whether people should still believe that justice will prevail. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present

ring on her finger,” and asking the jury not to forget the victim “because she deserves justice” did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim’s family is not prohibited, as such evidence may be relevant to the jury’s decision as to whether the death penalty should be imposed. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh’g denied (Miss. 1996).

Comments made by a prosecutor during his closing argument in a capital murder prosecution did not constitute prosecutorial misconduct, where the prosecutor stated that the victim was a human being and had a right to be protected by the law even though he may not have been wealthy or prominent or a leader in his community, in spite of the defendant’s argument that the “value” of the victim’s life should not be a factor in considering whether the defendant should live or die and that such a consideration introduces an arbitrary factor into the process, since the prosecutor’s statement was innocuous. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

### 28.5. Harmless error.

In defendant’s capital murder trial, the language on the verdict form stating that “if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole” was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

### 29. Psychological testimony.

Forensic psychologist who gave opinion that neurological examination was needed

to determine if defendant in capital case had brain damage that limited his ability to appreciate criminality of his conduct could be cross-examined at resentencing on basis for that opinion, even if cross-examination brought out information from otherwise privileged medical records; when defendant placed his mental condition in issue, he waived privilege to medical records relied on by psychologist. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Defendant was precluded, at remand for resentencing in capital murder case, from moving to exclude, as speculative, testimony by forensic pathologist as to suffering endured by victim was not error, where objection was not raised during guilt phase. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Testimony by forensic pathologist as to suffering endured by victim, taken during guilt phase of capital murder prosecution and reintroduced at resentencing, was not rank speculation and was admissible; state demonstrated that pathologist’s testimony fell within bounds of forensic pathology by showing that his expertise dealt with wounds, suffering, and means of inflicting injury. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Refusal to permit defense psychologist to testify at capital sentencing proceeding as to what brain scans and EEGs measure, was abuse of discretion; though psychologist was not trained to read brain scans or EEG results, he knew what those tests measured. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh’g denied, 706 So. 2d 252 (Miss. 1998).

Trial court acted within its discretion at death penalty phase of trial in excluding, as irrelevant, psychological report that allegedly showed that it was probable that accomplice, rather than defendant, was mastermind behind robbery and murder of victim, in absence of evidence that accomplice had any kind of dominating influence over defendant. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied,



518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the sentencing phase of a capital murder prosecution, the introduction of a state psychologist's testimony that it was her opinion that the defendant was not psychotic or mentally ill, did not violate the defendant's Sixth Amendment right to counsel where the defendant's attorney requested the psychiatric examination, the defendant testified that he wanted to have a psychiatric evaluation to determine whether he knew right from wrong, and presumably the defendant had consulted with his attorney about the nature of the psychiatric examination. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily

lead. *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

A trial court committed reversible error during the sentencing phase of a capital case in permitting the prosecutor to use a psychiatric evaluation to cross-examine a defense witness in violation of the Sixth Amendment right to confront witnesses where the doctors who wrote the evaluation were not called for trial and could not be cross-examined by the defendant. *Lanier v. State*, 533 So. 2d 473 (Miss. 1988).

In a prosecution for capital murder, the trial court properly refused an instruction permitting the jury to consider defendant's diminished capacity to appreciate the criminality of his conduct, pursuant to subsection (6)(f) of this section, in the absence of any expert testimony suggesting that defendant was mentally retarded or that he was suffering from a mental disorder, disease or defect. *Williams v. State*, 445 So. 2d 798 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985).

### 30. Ineffective assistance of counsel.

Defense counsel was not ineffective for failing to submit Miss. Code Ann. § 99-19-101(6)(b), (d)-(f) factors during the penalty phase because (1) defendant was not under the influence of extreme mental or emotional disturbance; (2) defendant's participation in the robbery and murder was not relatively minor because he told the police that he played an active role in the robbery and murder; (3) there was no showing of extreme distress or domination either at trial or in the post-trial filings; and (4) defendant had the ability to understand the nature and quality of his alleged acts and to understand the difference between right and wrong at the time. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and,



thus, there was no reason for counsel to object to underlying felony being counted as aggravator. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and

there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

If capital murder defendant shows that failure of trial defense counsel to call favorable, willing witnesses during penalty phase of trial and failure to investigate and present psychological evidence resulted in ineffective assistance of counsel, death penalty will be vacated and new trial set as to sentencing only. *Leatherwood v. State*, 473 So. 2d 964 (Miss. 1985).

### 31. Racial discrimination in application of death penalty.

Defendant was not entitled to make racial arguments against death penalty during sentencing phase of capital murder case, where defendant made no claim of racial bias, presented no proof of racial bias, and was not faced with any potential bias on basis of race of his victims. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to make racial arguments against death penalty, even if racial arguments to jury are appropriate, in absence of racial bias claims, proof of bias, and in absence of any potential bias on basis of race of victims. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

### 31.5. Resentencing.

Prohibiting defendant from introducing exculpatory evidence at resentencing for capital murder following affirmance of conviction, while permitting state to introduce evidence impacting on guilt in order to prove at least one Enmund factor demonstrating intent to kill, did not constitute

a de facto directed verdict against defendant. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Introduction of capital murder conviction at resentencing following affirmance of conviction was not error; resentencing proceeding was not a separate trial from guilt determination as asserted by defendant, and even if it were, admission of verdict was permitted if relevant to an aggravator or to an Enmund factor bearing on intent to kill. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Color photographs of victim were admissible at resentencing following affirmance of capital murder conviction; defendant was already identified as guilty party based not only upon conviction but upon his confession and physical evidence, and evidence was relevant to establish that murder was committed during commission of a rape and to prove heinous, atrocious, and cruel aggravator. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

## II. UNDER FORMER § 99-19-13.

### 32. In general.

During the sentencing phase of a murder trial, evidence that the defendant had declared bankruptcy and was separated from his wife was admissible to rebut the defendant's testimony that he had a steady job and loved his family. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

This section [Code 1942, § 2536] is not unconstitutional in providing for the fixing of the punishment in murder cases by the same jury that determines guilt.



Capler v. State, 237 So. 2d 445 (Miss. 1970), vacated in part, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972), on remand, 268 So. 2d 338 (Miss. 1972).

It is not necessary that the same jury that rendered the verdict of guilty against a defendant indicted for murder shall also determine the question of his punishment. Irving v. State, 228 So. 2d 266 (Miss. 1969), vacated in part, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972).

In a prosecution for rape, the trial court did not err in accepting accused's plea of guilty and fixing his punishment at life imprisonment without impaneling a jury, and no constitutional right of the accused was violated thereby. Bullock v. Harpole, 233 Miss. 486, 102 So. 2d 687 (1958).

On murder conviction, it is within the province of the jury to fix the penalty at death or life imprisonment. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760 (1944).

The power of the jury under the statute is independent of the evidence. Spain v. State, 59 Miss. 19 (1881).

If the jury agree on defendant's guilt but cannot agree on the punishment, it should return a general verdict of guilty. Green v. State, 55 Miss. 454 (1877); Fleming v. State, 60 Miss. 434 (1882).

### 33. Instructions.

Under Code 1892, § 1439 [Code 1942, § 2536], it is not error in a prosecution for homicide for the court to refuse to compel the state to instruct the jury that if they find defendant guilty, the death penalty will follow unless they fix the punishment at imprisonment in the penitentiary, where such an instruction is given at the instance of accused. Evans v. State, 87 Miss. 459, 40 So. 8 (1906).

In a murder case a jury agreeing as to the guilt but not as to the punishment must under this section [Code 1942, § 2536] return a verdict of guilty and the court may so instruct. West v. State, 80 Miss. 710, 32 So. 298 (1902).

If no instruction on the subject is asked, it is not ground for reversal of a conviction that the court failed to give an instruction on the consequences of a failure by the jury to affix the punishment. Penn v. State, 62 Miss. 450 (1884).

The jury should be instructed not only as to its power but as to the consequences

of a failure to affix the punishment. Walton v. State, 57 Miss. 533 (1879).

### 34. Qualifications of jurors.

Where, after conviction of the defendant on an indictment for murder, it was found by the court that in excusing jurors expressing scruples against imposition of the death penalty the rules in such cases provided had been violated, a new jury trial could be granted on the sole issue of punishment, without a new trial on the issue of defendant's guilt. Irving v. State, 228 So. 2d 266 (Miss. 1969), vacated in part, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972).

In a homicide prosecution, where the state was permitted to challenge for cause three jurors who expressed conscientious scruples against imposing the death penalty, an order sentencing the defendant to death must be reversed; upon reversal of the order, the trial judge must remand for a new trial as to punishment, or if the district attorney and the trial judge should so agree, might sentence the defendant to life imprisonment without the intervention of the jury. Rouse v. State, 222 So. 2d 145 (Miss. 1969).

Jurors in murder prosecution who have conscientious convictions against inflicting the death penalty are not qualified. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760 (1944).

In qualifying the jurors in murder prosecution, it is the duty of the judge to inquire of the jurors, and the duty of the jurors to answer under oath, whether they have conscientious convictions against inflicting the death penalty. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760 (1944).

No set words or phrases are required or prescribed in propounding question to prospective jurors in murder prosecution whether they have conscientious convictions against inflicting death penalty. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760 (1944).

The court, in a capital case, should exclude from the jury persons who state they have conscientious scruples against capital punishment. Borowitz v. State, 115 Miss. 47, 75 So. 761 (1917).

### 35. Sentence and punishment.

State statute which imposed mandatory death penalty for first-degree murder,



which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a violation of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Imposition of death penalty did not constitute cruel and unusual treatment under statutes which provided (1) if defendant is found guilty of first degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to 8 aggravating and 7 mitigating circumstances specified in said statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its functions to be guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution is not violated by the imposition of the death penalty for the crime of murder under a

state's statutory scheme whereby (1) capital homicides are limited to intentional and knowing murders committed in the five specified situations of murder of a peace officer or fireman, murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, murder committed while escaping or attempting to escape from a penal institution, murder committed for remuneration, and murder committed by a prison inmate when the victim is a prison employee; (2) if a defendant is convicted of a capital offense, a separate presentence hearing must be held before the jury, where any relevant evidence may be introduced and arguments may be presented for or against the death sentence; (3) the jury must answer the questions (a) whether or not the defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976), vacated, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of

a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statute must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge and jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976).

Where trial judge inadvertently omitted to impose sentence after verdict of jury

fixing punishment at life imprisonment, cause was required to be remanded to trial court in order that sentence might be imposed of record by judgment in accordance with the verdict, as required by statute. *Harris v. State*, 46 So. 2d 923 (Miss. 1950).

Sentence by the trial court must be in open court and recorded in the minutes at a special or regular term thereof, and it cannot be done in vacation, even by consent, nor would a dismissal of the appeal validate such sentence, when imposed in vacation. *Harris v. State*, 46 So. 2d 923 (Miss. 1950).

Motion for new trial in prosecution for homicide on ground of compromise verdict was held properly denied although verdict certified that jury was unable to agree as to punishment since the record did not show defendant offered any juror as witness to sustain his motion but simply filed an unsworn motion for new trial averring that no member of the jury voted for death sentence and that there was no disagreement among the jurors as to the punishment and since members of the jury cannot be offered as witnesses to impeach their own verdict. *Calvin v. State*, 206 Miss. 94, 39 So. 2d 772 (1949).

Where defendants had been convicted of murder and sentenced to death, the supreme court had no power to reverse and remand the case on the mere ground that another jury might fix the punishment at life imprisonment because of the youth and indiscretion of defendants, as the exercise of clemency is vested in the executive. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

## RESEARCH REFERENCES

**ALR.** Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 A.L.R.3d 1461.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 A.L.R.4th 1028.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

Sufficiency of evidence, for purposes of death penalty, to establish statutory ag-

gravating circumstance that murder was heinous, cruel, depraved or the like—post-*Gregg* cases. 63 A.L.R.4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of



death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-Gregg cases. 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 A.L.R.4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-Gregg cases. 67 A.L.R.4th 942.

Adequacy of defense counsel's representation of criminal client - conduct occur-

ring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

Downward departure under state sentencing guidelines based on extraordinary family circumstances. 106 A.L.R.5th 377.

Propriety of carrying out death sentences against mentally ill individuals. 111 A.L.R.5th 491.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty. 78 A.L.R. Fed. 553.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 956 et seq.

**CJS.** 24 C.J.S., Criminal Law § 2191.

**Lawyers' Edition.** Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

**Law Reviews.** Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. Coll. L. Rev. 169, Spring, 1990.

Constitutional problems concerning certain aggravating circumstances used for capital murder sentencing in Mississippi, 53 Miss. L. J. 319, June, 1983.

### **§ 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment.**

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravated circumstances enumerated in Section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.



**SOURCES:** Laws, 1977, ch. 458, § 3; Laws, 1994, ch. 566, § 4, eff from and after July 1, 1994.

**Editor's Note** — Laws of 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Conduct of trial in death penalty cases, see Miss. Unif. Cir. & County Ct. Prac. R. 10.04.

## JUDICIAL DECISIONS

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### 1. In general.

In defendant's capital murder trial, the language on the verdict form stating that "if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole" was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

Statute applicable to capital cases which provides that if jury cannot, within

a reasonable time, agree as to punishment, judge shall dismiss jury and impose sentence of life imprisonment does not allow jury to determine what constitutes "reasonable time" for deliberations and to report its findings to court. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Even if jury had never been instructed on what would happen if they could not agree on sentence, there would have been no error. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

It is suggestive to provide signature line only under the verdict for death penalty. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury was not required to find that aggravating circumstances outweighed mit-

igating circumstances beyond reasonable doubt before imposing death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

## **2. Aggravating circumstances, generally.**

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Individual can have prior conviction involving use of threat or violence and yet

not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted of felony involving use of threat or violence, provided that it was properly certified. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied,



519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evidence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which were unsupported by evidence that could substantiate jury's finding of those factors. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 children to death and inflicted life-threatening stab wounds on one adult and another child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder aggravating factor for when defendant knowingly creates great

risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

The new rule announced in *Willie v. State* (Miss. 1991) 585 So. 2d 660 — that a jury may not "doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators" when determining the sentence to be imposed in a capital murder case — is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Introduction, at capital sentencing proceeding, of evidence as to defendant's membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white victim. *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992).

### 3. —Invalid or improperly defined.

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally



vague sentencing instruction defining the “especially heinous” aggravating circumstance. *Davis v. State*, 655 So. 2d 864 (Miss. 1995).

A capital murder defendant’s sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury’s reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or conduct a traditional harmless error analysis. *Stringer v. State*, 638 So. 2d 1285 (Miss. 1994).

A capital murder defendant’s sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury’s reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

A capital murder defendant’s motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury’s reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Wiley v. State*, 635 So. 2d 802 (Miss. 1993).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant’s motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury’s reliance on an invalid aggra-

vating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. *Wilcher v. State*, 635 So. 2d 789 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

A capital murder defendant’s motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury’s consideration of the “especially heinous, atrocious or cruel” aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). *Smith v. State*, 648 So. 2d 63 (Miss. 1994).

#### **4. —Robbery and pecuniary gain as separate aggravators.**

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in allowing the jury to consider the aggravating factors of “murder committed while in the commission of a robbery” and “murder committed for pecuniary gain” as 2 separate and distinct aggravators. *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992).

#### **5. —“Especially heinous, atrocious, or cruel”.**

Instruction on aggravator of committing murder in order to avoid arrest was

supported in capital sentencing proceeding by evidence that victim was still alive after rape and that defendant then stuffed defendant's panties down her throat, and by evidence that defendant mutilated victim's genital area after she died so that authorities would think a "sex fiend" had committed crime. *Holland v. State*, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

"Heinous, atrocious, or cruel" instruction in capital murder prosecution must be accompanied by appropriate limiting instruction. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Instruction defining "heinous, atrocious, or cruel" murder as one "accompanied by such additional acts as to set the crime apart from the norm of capital murders—the conscienceless of pitiless crime which is unnecessarily torturous to the victim" was sufficient, even though instructions also stated that "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

The "specially heinous" aggravator does not violate Eighth Amendment. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

The "specially heinous" aggravator does not violate Fourteenth Amendment. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if cause of death was strangulation, as pa-

thologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was



proper where it comported with the requisite narrowing language found in *Coleman v. State*, 378 So. 2d 640 (Miss. 1979); *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravat-

ing circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciousness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate even where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In the sentencing phase of capital murder case, the jury should be given a limiting instruction as to the meaning of "especially heinous, atrocious or cruel." *Lanier v. State*, 533 So. 2d 473 (Miss. 1988).



Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in *Maynard v. Cartwright* (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, *Clemons v. Mississippi* (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and *Maynard* and *Clemons* did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; *Clemons* decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to *Clemons* decision that decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

**6. —"Avoiding or preventing lawful arrest or effecting escape from custody".**

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place,

and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

If there is evidence from which it may be reasonably inferred that substantial reason for killing was to conceal identity of killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

"Avoiding arrest" aggravating factor was properly submitted to jury in penalty phase of capital murder case, even though defendant claimed that arrest avoidance was inherent in every murder, as it by definition eliminated one of the possible witnesses and that further limiting instruction was required to channel jury's focus on situations in which there is specific evidence demonstrating that one of the purposes beyond the killing was desire to avoid detection and apprehension for underlying crime. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead

defendant doused body with gasoline and burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The aggravating circumstance that the capital murder was committed for the purpose of "avoiding or preventing a lawful arrest" does not apply only to murders of law enforcement officers; thus, the question of whether this aggravating factor should be submitted to the jury does not depend on whether the victim was a law enforcement officer but whether the facts and circumstances prove that avoiding lawful arrest was a motive in the killing. *Chase v. State*, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The statutory aggravating circumstance that "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" is properly submitted to the jury if evidence exists from which the jury could reasonably infer that concealing the killer's identity, or covering the killer's tracks to avoid apprehension and arrest, was a substantial reason for the killing. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S.

Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

#### **7. —Reweighing by appellate court.**

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling *Johnson v. State* (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Missis-



Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) *Johnson v. State*, 547 So. 2d 59 (Miss. 1989), but see *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel," but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in *Maynard v. Cartwright* (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, *Clemons v. Mississippi* (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and *Maynard* and *Clemons* did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; *Clemons* decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to *Clemons* decision that decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

## 8. Jury instructions.

Based on jury instructions given and the written verdict delivered in defendant's capital murder case, it was clear

that the jury had followed the instructions on the burden of proof applying to a finding of aggravating circumstance, although there was no requirement that the verdict be "beyond a reasonable doubt," and there was no violation of *Apprendi* or *Ring*; further, the transcript of the verdict clearly indicated that it had been unanimous, and in compliance with Miss. Code Ann. §§ 99-19-101 and 99-19-103. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Jury instruction that all twelve jurors had to agree on verdict before verdict could be returned into court, when read with another instruction which made clear the option jury had in returning to courtroom, properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

When read as a whole, instructions properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment, where court instructed "that all 12 jurors must agree on the verdict before the verdict can be returned into Court," and also made it clear that jury's options were to return verdict of death, return verdict of life imprisonment, or report their inability to agree on a verdict, despite claim that instructions failed to clarify that if, within a reasonable time, jury failed to agree unanimously, it must cease deliberations and report its findings to the court. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Even if jury had never been instructed on what would happen if they could not agree on sentence, there would have been no error. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998),



reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Defendant was not entitled to diminished capacity instruction in capital murder case, even though doctor testified that defendant's substance abuse problem caused him to suffer "a diminished cerebral activity, cerebral ability" at time of crime; there was no evidence that defendant was substantially impaired in his capacity to appreciate criminality of his conduct and to conform his conduct to requirements of the law. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert.

denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consensus on mitigating circumstances is required. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in further deliberations. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor would fall under "catch-all" mitigating circumstance. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Whimsical or residual doubt instructions are not required as a mitigating

circumstance in death penalty cases. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme remorse for crimes committed. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defendant would be executed by lethal injection if sentenced to death. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court did not violate Eighth Amendment rights of capital murder de-

fendant by refusing to give sentencing phase instruction that court was obligated to consider mitigating factors which in fairness, sympathy and mercy to defendant extenuate or reduce degree of blame or punishment. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant's age at time she would be eligible for parole, if given life sentence, was speculative. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996),



reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A capital murder defendant is not entitled to a "mercy" instruction. *Foster v.*

*State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73-the statute under which the defendant pled guilty-defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).



In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of capital murder prosecution, an instruction cautioning the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, the court properly denied the defendant's requested instruction that the jury "must consider" sympathy and mercy for the defendant, since the instruction was cumulative where another instruction informed the jury that it was required to consider mitigating circumstances if any aggravating circumstances were found to exist. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

In the penalty phase of a capital murder prosecution, a jury instruction stating that the jury "may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant," was not defective, notwithstanding

the defendant's claim that the use of the word "may" allowed the jury to permissively consider mitigating circumstances instead of requiring them to do so, since the instruction did not place limitations on what mitigating circumstances the jury could consider. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In the penalty phase of a capital case, the jury's consideration of whimsical doubt as a mitigating factor was not impaired by the trial court's denial of a jury instruction on whimsical doubt where defense counsel was permitted to argue whimsical doubt to the jury. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

In a capital murder prosecution, the jury's note sent to the court after the jury had deliberated for over two hours which stated, "We the jury cannot come to a unanimously [sic] decision-what shall we do?" was simply a request for further instruction, and did not require the dismissal of the jury and imposition of a life sentence. *Jones v. Thigpen*, 555 F. Supp. 870 (S.D. Miss. 1983), rev'd on other grounds, 741 F.2d 805 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984).

In a prosecution for capital murder the trial court properly refused defendant's requested amendment to his jury instruction that "if you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows: we, the jury are unable to unanimously agree on the punishment to be inflicted," where there was no indication in the record that the jury had any difficulty reaching an agreement, and where Code § 99-19-103 imposed a duty on the court to dismiss the jury after a reasonable period of deliberation and impose a life sentence on the defendant. *King v. State*, 421 So. 2d 1009 (Miss. 1982), cert. denied, 461 U.S. 919, 103 S. Ct. 1903, 77 L. Ed. 2d 290 (1983), habeas corpus granted, 1 F.3d 280 (5th Cir. 1993), vacated in part, 656 So. 2d 1168 (Miss. 1995).

**9. —Life, without probation or parole.**

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

**10. —Weighing of aggravating and mitigating circumstances.**

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert.



denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Jury instruction in penalty phase of capital murder prosecution which follows language of § 99-19-101 and this section need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

#### 11. —Beyond reasonable doubt.

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating cir-

cumstances beyond a doubt outweigh the mitigating circumstances. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

In a capital murder prosecution in which defendant was sentenced to death under § 99-19-101 and this section, the trial court did not err in refusing to instruct the jury that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. *Hill v. State*, 432 So. 2d 427 (Miss. 1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983), habeas corpus granted, 667 F. Supp. 314 (N.D. Miss. 1987), aff'd in part, rev'd in part, 887 F.2d 513 (5th Cir. 1989), opinion supplemented on denial of reh'g, 891 F.2d 89 (5th Cir. 1989), vacated, 498 U.S. 801, 111 S. Ct. 28, 112 L. Ed. 2d 6 (1990), on remand, 920 F.2d 249 (5th Cir. 1990), post-conviction relief granted, 659 So. 2d 547 (Miss. 1995), reh'g denied, (Miss. 1995).

#### 12. Habitual offender.

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).



In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

### 13. Cruel and unusual punishment.

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation. *Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995), reh'g denied, 514 U.S. 1078, 115 S. Ct. 1725, 131 L. Ed. 2d 583 (1995).

Application of state death penalty statute to homicide defendant who was 15-years-old at time of offense, following trial as adult which resulted in conviction of first-degree murder, violates cruel and unusual punishment clause of Eighth Amendment, according to plurality of U.S.

Supreme Court. *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), on remand, 762 P.2d 958 (Okla. Crim. App. 1988).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3201, 96 L. Ed. 2d 688 (1987).

### 14. Reasonable time for deliberations.

Under the unique circumstances of the case, especially considering the fact that the jury in essence had to go through two separate deliberations in order to follow the sentencing instructions and return separate verdicts for both defendants, the court could not say that the jury did not reach its verdicts within a reasonable time where deliberations required about three hours. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

### 15. Sentence by court.

In a capital murder case, a court did not commit error in sending the jury to deliberate further where a document retrieved from the jury room trash can was not submitted by the jury to the trial court as a verdict and was not submitted on post-trial motion to the trial court, where the only reason the court of appeals was aware of it was because the defense attorney had it added to the court papers after the trial. Thus, the only verdict actually given to the court was the one sentencing defendant to death. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

Where the court sentenced the defendant to life after the jury was unable to agree on a sentence, the life sentence was automatically one without parole in light of the amendment to § 47-7-3(1)(f) to provide that no person shall be eligible for parole who is charged, tried, convicted and sentenced to life imprisonment under § 99-19-101. *Barnes v. State*, 763 So. 2d 216 (Miss. Ct. App. 2000).

## RESEARCH REFERENCES

**ALR.** Propriety of carrying out death sentences against mentally ill individuals. 111 A.L.R.5th 491.

**Lawyers' Edition.** Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating

or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

**Law Reviews.** Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

## § 99-19-105. Review by State Supreme Court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and

(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death;

(b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and (i) affirm the sentence of death or (ii) hold the error in the sentence phase harmless error and affirm the sentence of death or (iii) remand the case for a new sentencing hearing; or

(c) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

**SOURCES:** Laws, 1977, ch. 458, § 4; Laws, 1984, ch. 448, § 7; Laws, 1985, ch. 305, § 1; Laws, 1994 Ex Sess, ch. 23, § 2; Laws, 2000, ch. 569, § 11, eff from and after July 1, 2000.

**Editor's Note** — Laws of 2000, ch. 569, § 1, provides:

“SECTION 1. Sections 1 through 18 of this act may be cited as the ‘Mississippi Capital Post-Conviction Counsel Act.’”

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Criminal docket in supreme court, see § 9-3-21.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

## JUDICIAL DECISIONS

### I. UNDER CURRENT LAW.

1. In general.
2. Reweighing.
3. Invalid or improper definition of aggravating factor.
4. Harmless error.
5. “Especially heinous, atrocious, or cruel”.
6. Limiting instruction.
7. Proportionality.
8. Enmund requisites.
9. Contemporaneous objection.
10. Prosecutor's comments.
12. —Appellate review.
13. Particular cases; death penalty upheld.
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- 16.-20. [Reserved for future use.]

### II. UNDER FORMER § 99-19-59.

21. In general.
22. Reasons for delay of execution.

### I. UNDER CURRENT LAW.

#### 1. In general.

A defendant is entitled to appointment of counsel in connection with the automatic review of a death sentence. *Jackson v. State*, 732 So. 2d 187 (Miss. 1999).

Provision of post-conviction relief statute requiring that petition for relief be filed within three years after entry of judgment of conviction upon plea of guilty is directed toward guilty pleas that are not attended by direct appeals; cases in which direct appeals have been taken are subject to express language tolling running of time limitation during pendency of such appeals. (Per Banks, J., with three



Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

In considering kidnapping aggravator in reviewing death sentence for murder, Supreme Court had to decide whether jury heard enough evidence to make determination of kidnapping. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Claim of error in submission of aggravating circumstance that capital offense was committed while defendant was engaged in the commission of sexual battery was waived, despite defendant's claim that it could not be procedurally barred because the Supreme Court has refused to apply the bar to aggravating circumstances and that the Court has a statutory obligation to consider possible sentencing errors not raised by defendant or objected to at trial. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Supreme Court is not under obligation to review all capital murder sentences to determine whether death sentence is appropriate in particular case, but Court must determine whether sentence is excessive or disproportionate to penalty imposed in similar cases. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In capital cases, although there is no error which, standing alone, requires reversal, aggregate effect of various errors may create such an atmosphere of bias, passion, and prejudice that they effectively deny defendant a fundamentally fair trial. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury was not required to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt before imposing death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

The Federal Constitution's Sixth Amendment guarantee of a criminal defendant's right to a jury trial does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, nor does it require jury sentencing even where the sentence turns on specific findings of fact; capital sentencing proceedings must satisfy the dictates of the due process clause of the Federal Constitution's Fourteenth Amendment. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

In capital murder prosecutions, as in other cases, the Supreme Court has the authority to affirm a conviction for a lesser included offense while simultaneously reversing as to the greater offense, if the evidence so warrants. *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988).

Where the jury's death penalty determination is based upon several aggravating circumstances, the invalidity of one of these circumstances will not constitutionally impair the sentence. *Lanier v. State*, 533 So. 2d 473 (Miss. 1988).

A prosecutor's argument in the sentencing phase of a capital case regarding the possibility of the defendant being paroled and the fact that another murder defendant had committed murder after being paroled from a life sentence constituted reversible error. The argument regarding parole introduced an arbitrary factor into the sentencing process proscribed by § 99-19-105(3)(a). *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

A trial court's discretion in passing upon the extent and propriety of questions addressed to prospective jurors is not unlimited and the Supreme Court will take note of abuse on appeal where prejudice to the accused is present. *Williams v. State*, 544

So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

In carrying out the duty imposed by this section, the Mississippi Supreme Court must determine whether the death sentence imposed in a particular case is excessive or disproportionate to the penalty imposed in similar cases, and this comparison is made from cases in which the death sentence has been imposed and has been reviewed on appeal by the court. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and where matter of whether defendant is guilty at all is by no means free of all doubt. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

In conducting required proportionality review of death penalty, Mississippi Supreme Court is not required to conduct detailed examination and review of all capital murder cases. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

## 2. Reweighing.

Post-conviction relief was denied in a capital murder case on the issue of whether a circuit court erred by using the aggravating circumstance of "especially heinous, atrocious, or cruel" based on a sufficiency of the evidence; however, even if it was not barred, the issue was without merit since the victim was beaten, strangled, raped, stabbed, and left to die as her home was set on fire. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Statute giving Supreme Court power to reweigh aggravating and mitigating factors or conduct harmless error review of imposition of death penalty has no application to sentences imposed prior to its

passage; right to jury determination of penalty of death is substantial substantive right, deeply rooted in law, which should not be annulled by retroactive application of statute as amended. (Per *Banks, J.*, with three Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for



consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling *Johnson v. State* (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) *Johnson v. State*, 547 So. 2d 59 (Miss. 1989), but see *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

The Federal Constitution does not prevent a state appellate court from upholding a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence-although such a conclusion does not mean that state appellate courts are required to, or necessarily should, engage in such reweighing-as (1) a defendant's Sixth Amendment right to a jury trial is not infringed where an appellate court invalidates one of two or more aggravating circumstances found by the

jury but affirms the death sentence after itself finding that the one or more valid aggravating factors outweigh the mitigating evidence; (2) the defendant does not have an unqualified liberty interest, under the due process clause of the Fourteenth Amendment, to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed, where (a) the state court has asserted its authority under state law to decide this question for itself rather than considering itself bound to vacate the sentence and remand for new sentencing proceedings before a jury, and (b) the United States Supreme Court has no basis for disputing the state court's interpretation of state law; and (3) nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the Eighth Amendment's objectives, in capital sentencing proceedings, of measured consistent application and fairness to the accused, since (a) state appellate courts-which must routinely consider, in "weighing" states, whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed, and must engage in a similar process of weighing aggravating and mitigating evidence in conducting proportionality review-can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances and background and on the crime, (b) there is nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence, and (c) an appellate court is able to evaluate adequately any evidence relating to mitigating factors without the assistance of written jury findings. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating



circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance—which was found to be unconstitutionally vague—or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

In a state where capital sentencing procedures require the sentencing jury to weigh aggravating circumstances and mitigating factors in order to determine the propriety of a death sentence, an automatic rule by which an appellate court would affirm a death sentence—even though that sentence was based in part on an aggravating circumstance that is found to be invalid—so long as there remained at least one valid aggravating circumstance, would itself be invalid under the Federal Constitution, for such a rule would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

### **3. Invalid or improper definition of aggravating factor.**

The new rule announced in *Willie v.*

*State* (Miss. 1991) 585 So. 2d 660 — that a jury may not “doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators” when determining the sentence to be imposed in a capital murder case — is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally vague sentencing instruction defining the “especially heinous” aggravating circumstance. *Davis v. State*, 655 So. 2d 864 (Miss. 1995).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or conduct a traditional harmless error analysis. *Stringer v. State*, 638 So. 2d 1285 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Wiley v. State*, 635 So. 2d 802 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance which was found to be unconstitutionally vague or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one

valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). *Smith v. State*, 648 So. 2d 63 (Miss. 1994).

#### 4. Harmless error.

A sentence of death was not improperly based on "vengeance and sympathy," in spite of the defendant's argument that the jury's sentencing determination was improperly predicated on the personal characteristics of the victim, where in response to the defendant's parents' request to the jury not to sentence their son to death the prosecutor merely noted that the defendant's parents were not the only ones who had suffered and grieved and that their "tears might be outweighed by the fact of the victim's murder," and he reminded the jury that the victim's parents had also suffered a loss and that they must not forget the "cold, calculated killing" of the victim. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995),



post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. *Wilcher v. State*, 635 So. 2d 789 (Miss. 1993).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

In determining whether a death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance, may be upheld on appeal on the basis of a determination that the error which occurred during the sentencing procedure was harmless, the proper standard of proof is whether the error has been shown to have been harmless beyond a reasonable doubt. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed.

2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

The Federal Constitution does not prevent a state appellate court from upholding a death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance, by determining that the error which occurred during the sentencing procedure was harmless; such a conclusion does not mean, however, that state appellate courts are required to, or necessarily should, engage in harmless-error analysis in such instances. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), on remand, 593 So. 2d 1004 (Miss. 1992).

### 5. "Especially heinous, atrocious, or cruel".

Even if it was error for an officer to testify as an expert witness as to blood spatters showing that the victim was murdered execution-style, evidence that defendant abducted the victim from her home in broad daylight, forcing her to leave her three-year-old son sleeping alone in the house; forced her to drive to a wooded area on the pretext that he was going to deliver her to his partner while he retrieved ransom money from her husband; upon arriving at the wooded area the victim, undoubtedly, realized that there was no partner waiting for defendant; defendant shot the victim in the back of the head and then drove back into town and continued with his plan to extort money from the victim's husband, where for two days he led the husband to believe that his wife was alive and well was still sufficient to support the especially heinous aggravator. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

Imposition of the death sentence upon a minor was not excessive or disproportionate where the murder of an elderly woman was found to be especially heinous, atrocious, and cruel. *Dycus v. State*, 875 So. 2d 140 (Miss. 2004).

Death sentence for a capital murder was proportionate because the evidence supported the trial court's finding that the statutory aggravating factors of engaging in the commission of or attempting to commit the crime of rape and committing a heinous, atrocious or cruel crime in the



execution of the victim were proven beyond a reasonable doubt. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

Evidence was sufficient to show that the murder of the two victims was especially heinous, atrocious, or cruel where (1) both victims sustained severe beatings about the head and face before having their throats viciously slashed to the backbone, (2) the blows to the women's heads were brutal enough to cause bleeding under the scalp and inside the skull, (3) one victim endured multiple bruises to the brain, and the other suffered bleeding within the brain, (4) a physician testified that the throat slashings would have occurred 10 minutes or more after the head beatings, and (5) one victim additionally sustained defensive posturing blows to her left arm and injuries to her torso consistent with being stomped, resulting in fractured ribs, bruised lungs, abdominal bleeding, and bruising and tearing in her liver and spleen. *Manning v. State*, 735 So. 2d 323 (Miss. 1999).

The jury properly found the murder to be especially heinous, atrocious, or cruel where (1) the defendant kidnapped the victim from her own home, (2) he made her walk to her impending doom on nerve damaged feet, all the while leaving her to ponder how, when, why and in what manner she would be executed, (3) when the two arrived at the defendant's chosen execution site, he ordered the victim to kneel before him, (4) he then stood a couple of feet away, and savagely fired four shots into her fragile body, (5) the first bullet tore through her right lung, diaphragm and liver, (6) the second ripped through her bloody back only to further tear apart her damaged right lung, (7) the next bullet took a brutal path through her left ear, neck and shoulder, and (8) the final bullet ripped through the victim's left arm. *Underwood v. State*, 708 So. 2d 18 (Miss. 1998).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if

cause of death was strangulation, as pathologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422

(1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996):

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

## 6. Limiting instruction.

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in *Coleman v. State* (Miss. 1979) 378 so2d 640. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

## 7. Proportionality.

Because the inmate failed to allege any specific errors resulting from the fact that the court lacked a transcript of voir dire, his argument was without merit. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

In defendant's capital murder case, there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or other arbitrary factor. The evidence supported the trial court's finding that the



statutory aggravating factor of robbery was proven beyond a reasonable doubt, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate. *Spicer v. State*, 921 So. 2d 292 (Miss. 2006).

Death sentence was not imposed under the influence of passion, prejudice, or any other factor where the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances. In comparison to other factually similar cases where the death sentence was imposed, the sentence of death was neither excessive or disproportionate in defendant's case; in addition, the jury did not consider any invalid aggravating circumstances. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

A death sentence for an aider and abettor who provided a gun that was used in a murder was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c) and state and federal constitutional law because, when the jury returned the death sentence, it specifically found that defendant had intended to kill the victim and contemplated that lethal force would be used. *Lynch v. State*, 877 So. 2d 1254 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1299, 161 L. Ed. 2d 122 (2005).

In a capital murder case, defendant's sentence of death was proportionate to the crime, as the victim was beaten, strangled, bitten three times, raped, stabbed twice, and left to die in her house, which was then set on fire. *Howard v. State*, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

The imposition of the death penalty was not disproportionate where the defendant was convicted of murdering two elderly women by means of beating them unconscious with an iron and slashing their throats with a kitchen knife, while robbing them of approximately \$12. *Manning v. State*, 765 So. 2d 516 (Miss. 2000).

A sentence of death was not disproportionate where the defendant was convicted of two counts of murder in the commission of a felony arising from two separate armed robberies. *Turner v. State*,

732 So. 2d 937 (Miss. 1999), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999).

The imposition of the death penalty was not found disproportionate where the record revealed (1) that the defendant was more than likely the instigator of the robbery that led to the victim's death, as well as the one who planned it, (2) that both defendants were armed on the day of the robbery and that the defendant knew that the codefendant had a gun, (3) the co-defendant, who was the triggerman, was also sentenced to death, (4) there was no evidence that the defendant suffered from any mental illness or retardation, and (5) the defendant had at least three prior convictions for felonies involving violence, including kidnapping and aggravated assault. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

The imposition of a sentence of death was not excessive or disproportionate, notwithstanding expert testimony that the defendant could be easily dominated, since nothing in the record indicated significant mental problems affecting the defendant. *Jordan v. State*, 728 So. 2d 1088 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

The death sentence was not disproportionate in a murder prosecution arising from the robbery of a store by the defendant and his brother where there was no evidence to support the defendant's contention that he was under the substantial domination of his older brother and the evidence showed that the defendant was, more than likely, the triggerman. *Smith v. State*, 724 So. 2d 280 (Miss. 1998).

Sentence of death was neither excessive nor disproportionate for defendant convicted of robbing and brutally murdering two women by stabbing them a total of 46 times. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Supreme Court's determination whether death sentence is excessive or disproportionate to penalty imposed in



similar cases is made by comparison of cases in which death sentence was imposed and was reviewed on appeal by the Court and, in making individualized comparison, Court considers the crime and the defendant. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Sentence of death imposed on defendant convicted of murder during robbery in which he stabbed victim 31 times was not disproportionate. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Supreme Court's determination whether death sentence is excessive or disproportionate to penalty imposed in similar cases is made by comparison of cases in which death sentence was imposed and was reviewed on appeal by the Court and, in making individualized comparison, Court considers the crime and the defendant. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Imposition of death sentence for ambush shooting of small convenience store operator as he left premises was not disproportionate to penalty imposed in similar cases, considering the crime and defendant. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

Death penalty for capital murder was not disproportionate in case in which defendant mutilated victim's body by excising her vagina and anus while she was still alive and joked about it later. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Death penalty for capital murder committed in course of robbery was not dis-

proportionate punishment, notwithstanding that defendant was under influence of cocaine at time offense was committed, that he had no prior felony convictions, and that he cooperated with police. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult and another child while in search of money kept in residence. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. *Walker v. State*, 671 So. 2d 581 (Miss.

1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average.

*Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A death sentence for a conviction of murder was disproportionate to the penalty imposed in similar capital cases, considering both the crime and the defendant, where the defendant was 18 years old at the time of the crime, he suffered some mental illness and mental retardation, the murder was committed by another person, and the defendant did nothing physically to assist the other person in the assault. *Reddix v. State*, 547 So. 2d 792 (Miss. 1989).

### 8. Enmund requisites.

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors, relating to circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim's death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death



penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

On remand of a capital murder case from the United States Supreme Court for a determination as to whether the death penalty requirements set forth in *Enmund v. Florida* (1982) 73 L. Ed. 2d 1140, 102 S. Ct. 3368 were met, the Mississippi Supreme Court could determine from the trial record whether the *Enmund* requisites were met, and was not required to remand the case to the lower court for an evidentiary hearing. If the state Supreme Court determined that the record supported the finding of at least one of the *Enmund* requisites, then the procedure would be to reimpose the death penalty and set an execution date for the defendant. If the court was unable to determine that at least one of the *Enmund* requisites was reflected by the record, then the case would be remanded to the lower court for an evidentiary hearing to make that determination. *Bullock v. State*, 525 So. 2d 764 (Miss. 1987).

### 9. Contemporaneous objection.

Objections to instruction on aggravating factor in resentencing phase of capital murder case were procedurally barred when raised for the first time on appeal; applicability of contemporaneous objection rule with respect to federal claims was not diminished in capital cases. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Claims of prosecutorial misconduct were waived absent contemporaneous objection, even though case was death penalty case, where none of the incidents complained about involved fundamental right and none were so egregious and inflammatory that trial court should have taken corrective action on its own motion. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g

denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

The rule that any error is waived if no contemporaneous objection is made is equally applicable in a capital case. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

### 10. Prosecutor's comments.

Although trial judge properly sustained defendant's objection to language in prosecutor's closing argument that imposition of death penalty would send a message, such language did not require reversal in capital murder trial. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Trial court did not erroneously allow prosecutor to comment on heinous, atrocious, and cruel aggravator in closing argument in sentencing phase of capital murder trial; record reflected that district attorney was merely restating testimony of doctor who performed autopsy which was a proper comment on the evidence. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g



denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

In view of fact that defense chose to use imagery in closing argument at sentencing trial to compare defendant to a rabbit, an image that hardly fit person who had already been found guilty of brutally stabbing victim 31 times, state's response using "mad dog" imagery was within latitude granted to counsel during closing arguments. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Attorneys are to be given wide latitude in making their closing arguments and, given latitude afforded attorneys during closing argument, any allegedly improper prosecutorial comments must be considered in context, considering circumstances of case, when deciding on their propriety. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Prosecutor's "who is the state" argument that "we, the government, are the victims of this crime, the sons, the daughters, the husband, the brothers, the sisters, the grandchildren" did not introduce element of passion, prejudice, or any other arbitrary factor into sentencing hearing, especially where there was no evidence that members of victims' families were present inside the rail at trial. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Prosecutor's "send a message" language in closing argument at sentencing trial did not require reversal, but prosecutors are cautioned against its use. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

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Claims of prosecutorial misconduct were waived absent contemporaneous objection, even though case was death penalty case, where none of the incidents complained about involved fundamental right and none were so egregious and inflammatory that trial court should have taken corrective action on its own motion. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Comment by prosecutor in resentencing phase of capital murder trial, in response to defense argument that defendant acting alone could not have killed victim in manner described, that defendant could have done it if victim was drunk or had taken drugs, or if defendant had given her drugs, though not recommended, was not so inflammatory as to necessitate trial court's objecting on its own motion or to require finding of error on appeal as arguing facts not in evidence, in case in which the defense first suggested that someone may have put drugs in victim's drink, in attempt to show that she was in altered state and not completely innocent. *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479 (1997), reh'g denied, 520 U.S. 1225, 117 S. Ct. 1727, 137 L. Ed. 2d 847 (1997).

Capital murder defendant was not prejudiced by prosecutor's statement that the only "correct choice" upon conviction was death penalty; trial court instructed that jury must decide whether defendant should be sentenced to death or to life imprisonment, leaving no question that

jurors were fully informed of their options, and jurors were presumed to follow law as instructed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly suggest that it was state Supreme Court, rather than jury, that had responsibility of imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so

improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defense counsel's comments that Charles Manson murders were more gruesome than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the



lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital case, the defense counsel's single objection

which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

## 12. —Appellate review.

If one sentencing aggravator is found to be invalid, under Miss. Code Ann. § 99-19-105(5)(b), the Supreme Court of Mississippi is authorized to reweigh the remaining aggravators against the mitigating circumstances and affirm, hold the error to be harmless, or remand for a new sentencing hearing. *Davis v. State*, 897 So. 2d 960 (Miss. 2004).

No evidence supported a finding that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and thus, imposition of death sentence on defendant for killing a 78-year old woman by stabbing her during a burglary was not improper. *Grayson v. State*, 806 So. 2d 241 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329 (2002).

A prosecutor's mention of appellate review during the sentencing phase of a capital case might well have lessened the jurors' sense of responsibility and therefore constituted reversible error. Furthermore, the prosecutor's insinuation that capital murderers monopolize judicial resources and are coddled by appellate courts may have introduced an arbitrary factor proscribed by this section. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), on remand, 481 So. 2d



850 (Miss. 1985), vacated on other grounds, 479 U.S. 1075, 107 S. Ct. 1269, 94 L. Ed. 2d 130 (1987).

In view of the severely limited power of appellate courts to review death sentences pursuant to subsections (3)(a), (b), and (c) of this section, a prosecutor may not argue to the jury regarding appellate review or any other matter which might reasonably be expected to cause a juror to consider that he or she shares with anyone other than his or her 11 fellow jurors the responsibility of determining whether a defendant will be sentenced to death, and such argument constitutes reversible error. *Williams v. State*, 445 So. 2d 798 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985).

### 13. Particular cases; death penalty upheld.

After reviewing the record in defendant's appeal as well as similar death penalty cases, the supreme court determined that defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; also, the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances. *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because the supreme court's review of the proportionality of the death sentence on direct appeal was not inadequate, Miss. Code Ann. § 99-19-105(3); first, the issue was procedurally barred because it had already been decided; and second, the supreme court once again found that the sentence imposed was not disproportionate because, in his course of robbing two stores, the inmate killed two men without provocation. *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month old victim — the death penalty imposed on defendant was (1) not influenced by passion, prejudice, or other existing arbitrary factor; (2) supported by the jury's finding of one or more statutory aggravating circumstances, specifically

those set out in Miss. Code Ann. § 99-19-101(5)(d) and (h); (3) not based on invalid statutory aggravating circumstances; and (4) not disproportionate to other cases of that type (death during the commission of a sexual battery of a young victim). Thus, his death penalty was affirmed. *Havard v. State*, 928 So. 2d 771 (Miss. 2006).

In a capital case for the murder of three people, including the strangulation of a four-year-old child, defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances; the sentence was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed; the sentence was not imposed under the influence of passion, prejudice, or any other factor; and the jury did not consider any invalid aggravating circumstances. *Rubenstein v. State*, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005).

In a capital case where three victims were beaten to death during a robbery, a death sentence imposed was not disproportionate to other similar crimes; the evidence supported a finding of the aggravating circumstance of robbery under Miss. Code Ann. § 99-19-105, and there was no evidence that the jury was under the influence of passion, prejudice, or any other arbitrary factor. *Le v. State*, 913 So. 2d 913 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 622, 163 L. Ed. 2d 508 (2005).

Upon reviewing defendant's capital murder case under Miss. Code Ann. § 99-19-105(3), there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor where the evidence supported the trial court's finding that the statutory aggravating factors of kidnapping, avoiding or preventing a lawful arrest and especially heinous, atrocious and cruel aggravator were proven beyond a reasonable doubt. Upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not

disproportionate in this case. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

In reviewing the death sentence under Miss. Code Ann. § 99-19-105(3), defendant's death sentence was appropriate because (1) there was no evidence supporting a finding that the sentence imposed was a result of passion, prejudice, or any arbitrary factor; (2) the evidence supported the jury's finding of the statutory aggravator that the crime was committed for pecuniary gain in that in defendant's statement he admitted holding the victim down while he took money from her pocket; and (3) the sentence was not excessive or disproportionate when the facts and circumstances of the case (defendant was actively involved in the bludgeoning of the female victim while robbing her) were compared with those of other cases. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

Defendant's capital murder convictions and death sentence were proper where there was nothing in the record to suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, Miss. Code Ann. § 99-19-105(3). *Brawner v. State*, 872 So. 2d 1 (Miss. 2004).

Defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor and the evidence was more than sufficient to support the jury's finding of the two statutory aggravating circumstances: a capital offense committed in the course of a robbery for pecuniary gain and by a person under a sentence of imprisonment, probation or parole. Further, in comparison to other factually similar cases where the death sentence was imposed, the sentence of death was neither excessive nor disproportionate. *Howell v. State*, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

Defendant's death sentence for the murder of her husband was proper where there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice

or any other arbitrary factor, the evidence supported the trial court's finding that the statutory aggravating factor of pecuniary gain was proven beyond a reasonable doubt, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in defendant's case given the equally heinous nature of the crime. *Byrom v. State*, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

Death penalty was neither disproportionate nor excessive for defendant who shot and killed two deputies in a car while the deputies were transporting defendant to prison. *Snow v. State*, 800 So. 2d 472 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056 (2002).

Trial court did not erroneously allow prosecutor to comment on heinous, atrocious, and cruel aggravator in closing argument in sentencing phase of capital murder trial; record reflected that district attorney was merely restating testimony of doctor who performed autopsy which was a proper comment on the evidence. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Although trial judge properly sustained defendant's objection to language in prosecutor's closing argument that imposition of death penalty would send a message, such language did not require reversal in capital murder trial. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Prosecutor's "who is the state" argument that "we, the government, are the victims of this crime, the sons, the daughters, the husband, the brothers, the sisters, the grandchildren" did not introduce element of passion, prejudice, or any other arbitrary factor into sentencing hearing, especially where there was no evidence that members of victims' families were present inside the rail at trial. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g



denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Prosecutor's "send a message" language in closing argument at sentencing trial did not require reversal, but prosecutors are cautioned against its use. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

In view of fact that defense chose to use imagery in closing argument at sentencing trial to compare defendant to a rabbit, an image that hardly fit person who had already been found guilty of brutally stabbing victim 31 times, state's response using "mad dog" imagery was within latitude granted to counsel during closing arguments. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

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A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid

schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A sentencing jury's failure to make written findings as to mitigating circumstances did not require reversal of a death sentence; § 99-19-103 requires a written enumeration of aggravating circumstances only, and § 99-19-101 has never been read to require an express written list of all the mitigating circumstances which members of the jury may find extant and such a list would often be impracticable because the law requires no consensus among jury members regarding mitigating factors. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73—the statute under which the defendant pled guilty—defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239



(Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

Death sentence was not excessive or disproportionate where the 26-year-old defendant killed a convenience store operator during earlier morning hours by blasts from a sawed-off shotgun fired from near-ambush type setting. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

Death sentence is not disproportionate sentence for defendant convicted of being active participant, if not leader, in deliberate, brutal slaying of peace officer carrying out duties, notwithstanding fact that accomplices in separate capital murder trials receive verdict of life imprisonment. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Appellate court denying State's motion to reset the execution of defendant's sentence of death imposed by a prior conviction made pursuant to this section would grant the defendant's request for addi-

tional time to prepare and file his application for collateral relief in the state court prior to the resetting of the execution date. *Wilcher v. State*, 462 So. 2d 688 (Miss. 1984).

After a defendant had pled guilty to murder, appellate court would deny State's motion for a new date of execution made pursuant to this section and would grant the defendant's request for a 60-day delay to allow him to prepare factual and legal claims under the Mississippi Uniform Post-Conviction and Sentence Collateral Relief Act. *Tokman v. State*, 462 So. 2d 687 (Miss. 1984).

In a capital murder trial, evidence was sufficient to support the conclusion that the murder had been committed during the course of a robbery, where the evidence indicated that defendant had selected the victims and pointed them out to his codefendant, stating to him that they were going to rob the two men, where defendant and codefendant went with the victims to the victims' apartment after that intent had been made known, where the victims had been cold-bloodedly murdered for no demonstrable reason other than taking what they had, where the car of one of the victims had been taken away after he had told defendant, immediately prior to being stabbed, that his money was in the trunk of the car, and where, as soon as practical, the trunk had been searched by defendant, in that no other evidence would be needed for a jury to find that the cold-blooded murder was done to effect a robbery as defined by § 97-3-73; moreover, in reviewing the sentence of death as required by this section, the Supreme Court, would find unhesitatingly that the elements of passion, prejudice, or any other arbitrary factor did not exist in arriving at the jury verdict. *Dufour v. State*, 453 So. 2d 337 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1231, 84 L. Ed. 2d 368 (1985), reh'g denied, 471 U.S. 1010, 105 S. Ct. 1880, 85 L. Ed. 2d 172 (1985), motion to vacate denied, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

In a prosecution for capital murder of a police officer while acting within his official capacity, evidence supported the jury's

findings of statutory aggravating circumstances as enumerated in subsections (2) and (3) of this section. *Johnson v. State*, 416 So. 2d 383 (Miss. 1982), writ denied, 449 So. 2d 1207 (Miss. 1984).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances (§ 99-19-101), where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831 (1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992).

In prosecution for the murder of a three-year-old girl, the circumstances in evi-

dence amply supported a finding that the crime was especially heinous, atrocious and cruel and the jury was warranted, from the evidence before it, in finding that the aggravating circumstances outweighed any circumstance that might conceivably have been considered a mitigating circumstance; the death penalty was not imposed wantonly or freakishly or under the influence of passion, prejudice or any other arbitrary factor and was not excessive or disproportionate to similar cases in which such sentence had been imposed. *Gray v. State*, 375 So. 2d 994 (Miss. 1979), cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (1980), reh'g denied, 448 U.S. 912, 101 S. Ct. 30, 65 L. Ed. 2d 1174 (1980).

The death penalty was properly imposed on defendant where, out of a desire to obtain money, he abducted his victim at gunpoint and fatally shot her when she tried to escape and where he then demanded and received a ransom from his victim's husband. *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978), cert. denied, 444 U.S. 885, 100 S. Ct. 175, 62 L. Ed. 2d 114 (1979), vacated, 681 F.2d 1067 (5th Cir. 1982), reh'g denied, 688 F.2d 395 (5th Cir. 1982).

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. *Washington v. State*, 361 So. 2d 61 (Miss. 1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2016, 60 L. Ed. 2d 388 (1979).



**14. —Death penalty reversed.**

The admission of evidence of threats made to witnesses by the defendant and evidence of his affiliation with the "black gangster disciples," without proof that any threats were actually made or that he was even a member of any gang, was an impermissible, arbitrary factor that the jury considered in its imposition of the death penalty that prejudiced the defendant. *Walker v. State*, 740 So. 2d 873 (Miss. 1999).

Harshness of life sentence in state prison in no way related to defendant's character, his record, or circumstances of his crime, and was properly excluded at capital murder sentencing trial. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which were unsupported by evidence that could substantiate jury's finding of those factors. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Imposition of death penalty after notice that state would not recommend it violated Fourteenth Amendment due process clause because of insufficient notice that penalty might be imposed; lack of adequate notice created impermissible risk that adversary process might have malfunctioned in case. *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In a prosecution for capital murder committed during a burglary, the death sen-

tence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. *Coleman v. State*, 378 So. 2d 640 (Miss. 1979).

**15. "Avoiding or preventing lawful arrest or effecting escape from custody".**

In a capital murder case, a court properly submitted to the jury the aggravating circumstances that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest where there was sufficient evidence from which it could be reasonably inferred that a substantial reason for killing the victim was to conceal the identity of the killer or killers so as to avoid apprehension and eventual arrest by authorities. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

It was reasonable for the jury to find that a substantial reason for slashing the throats of the two victims to ensure death was to prevent them from informing police who robbed them, thereby avoiding arrest, where (1) the defendant lied to the police in an effort to avoid arrest, (2) the victims knew the defendant, and (3) there was no need for the defendant to kill the victims to fulfill his purpose of robbing them after beating them unconscious. *Manning v. State*, 735 So. 2d 323 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).



**16.-20. [Reserved for future use.]****II. UNDER FORMER § 99-19-59.****21. In general.**

Where a conviction for a murder imposing the death sentence had been affirmed by the supreme court, fact that respondent was endeavoring to appeal from the judgment of the federal district court denying his application of a writ of habeas corpus and remanding him to the possession of the superintendent of the state penitentiary, did not prohibit the state supreme court from setting another execution date where respondent had failed to secure a writ of probable cause required by 28 USCS § 2253. *Goldsby v. State*, 233 Miss. 338, 102 So. 2d 215 (1958).

State supreme court, which had not issued mandate to trial court upon its affirmance of murder conviction imposing death sentence, the date for which had passed before dismissal of appeal by federal supreme court, still had jurisdiction of the case and the power to fix a new date therefor. *Wood v. State*, 198 Miss. 503, 23 So. 2d 264 (1945).

This section [Code 1942, § 2559] must be construed so as to fit harmoniously into the system of which it is a part. *Simmons v. State*, 197 Miss. 326, 20 So. 2d 64 (1944), cert. denied, 324 U.S. 821, 65 S. Ct. 590, 89 L. Ed. 1391 (1945).

Where Mississippi Supreme Court affirmed murder conviction but failed to issue mandate to the court below, and the federal supreme court dismissed an appeal and its mandate was issued and filed with the clerk of the Mississippi Supreme Court, the latter still had jurisdiction, the date fixed for execution of the death sentence having passed, to fix a new date for the execution thereof. *Thornton v. State*, 196 Miss. 637, 18 So. 2d 296 (1944), cert. denied, 323 U.S. 668, 65 S. Ct. 76, 89 L. Ed. 543 (1944).

A circuit judge in vacation has no authority, under this section [Code 1942, § 2559] to fix a day for the execution of a sentence. *Simmons v. State*, 196 Miss. 305, 17 So. 2d 798 (1944).

Where, after mandate of supreme court had been issued and filed in the court below directing it to proceed with the execution of judgment affirming rape con-

viction, stay of execution for 60 days was granted to permit defendant to apply to the Supreme Court of the United States for a review, but application therefor was not made within such time, trial court was authorized by this section [Code 1942, § 2559] to fix another date for the execution of death sentence. *Simmons v. State*, 196 Miss. 102, 16 So. 2d 617 (1944).

The governor can grant a respite and fix a later day for the execution. In such case no order of court under the section [Code 1942, § 2559] is necessary. *Ex parte Fleming*, 60 Miss. 910 (1883).

The statute is but declaratory of the common law. Like proceedings can be had in cases not capital. *Ex parte Bell*, 56 Miss. 282 (1879).

**22. Reasons for delay of execution.**

There is no reason for continuance of proceedings to set a new date for execution of sentence where the defendant has been tried and convicted three times on the same cause and where the matters alleged as a basis for a new trial have already been considered on appeal. *McGee v. State*, 47 So. 2d 155 (Miss. 1950), cert. denied, 340 U.S. 921, 71 S. Ct. 354, 95 L. Ed. 666 (1951).

"Legal reasons against the execution of the sentence," within the meaning of this section [Code 1942, § 2559], must be based upon happenings which have occurred since, but not at or before, the original trial. *Simmons v. State*, 197 Miss. 326, 20 So. 2d 64 (1944), cert. denied, 324 U.S. 821, 65 S. Ct. 590, 89 L. Ed. 1391 (1945).

Convict's assigned reasons why execution should not be ordered that he was denied due process in that he was put to trial when he was not capable of adequately aiding in his defense because suffering from a wound, and that a confession, used against him, had been procured by force and intimidation, were not sustainable, where he had full knowledge at the time of the trial of both of these matters, and the officers of the court in charge of the prosecution took no measure, actual or constructive, direct or indirect, to suppress or repress the convict's presentation of these matters to the court on his original trial, since he was given full opportunity to be heard. *Simmons v.*

State, 197 Miss. 326, 20 So. 2d 64 (1944), cert. denied, 324 U.S. 821, 65 S. Ct. 590, 89 L. Ed. 1391 (1945).

In proceeding under this provision to fix date for hanging, court was not required

to order trial on issue of convict's insanity, where he did not allege insanity arose after conviction. *Lewis v. State*, 155 Miss. 810, 125 So. 419 (1930).

### RESEARCH REFERENCES

**ALR.** Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence

of imprisonment, in confinement or correctional custody, and the like—post-Gregg cases. 67 A.L.R.4th 942.

**Law Reviews.** 1989 Mississippi Supreme Court Review: Sentencing of Criminal Defendant. 59 Miss. L. J. 871, Winter, 1989.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

## § 99-19-106. Date of execution of death sentence.

When judgment of death becomes final and a writ of certiorari to the United States Supreme Court has been denied or the time for filing such petition has expired, the court shall set an execution date for a person sentenced to the death penalty. Within sixty (60) days following the appointment of post-conviction counsel, upon declaration by counsel that he deems post-conviction review to be meritorious and that he intends to file an application for post-conviction review, the court may stay execution pending the disposition of the post-conviction proceeding. In the event no application for post-conviction relief is filed within one (1) year of the date of the disposition of the petition for writ of certiorari or the time for certiorari has expired, any stay entered by the court will automatically vacate. The filing of a declaration by counsel that he deems post-conviction review to be meritorious and intends to file an application for post-conviction review shall in no manner constitute the filing of an application for post-conviction review that would toll the running of any statute of limitations. Setting or resetting the date of execution shall be made on motion of the state that all state and federal remedies have been exhausted, or that the defendant has failed to file for further state or federal review within the time allowed by law.

**SOURCES:** Laws of 2000, ch. 569, § 17, eff from and after July 1, 2000.

**Editor's Note** — Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.'"

Sections 1 through 10 of Laws, 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Relief under Mississippi Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## JUDICIAL DECISIONS

## 1. In general.

Defendant cited no authority for his interpretation of Miss. Code Ann. § 47-7-29 that his death sentence should not be imposed until he finished serving his prior life sentence; the record did not indicate that defendant's parole was ever revoked so as to have his earlier sentence re-

imposed, and Miss. Code Ann. § 99-19-106 provided that execution should be set on motion of the State after all state and federal remedies were exhausted. *Mitchell v. State*, 886 So. 2d 704 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1982, 161 L. Ed. 2d 864 (2005).

## RESEARCH REFERENCES

**ALR.** Validity, construction, and operation of Federal Death Penalty Act, 18

U.S.C.A. §§ 3591 et seq. 195 A.L.R. Fed. 1.

## § 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

**SOURCES:** Laws, 1977, ch. 458, § 5; Laws, 1982, ch. 431, § 6, eff from and after July 1, 1982.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## JUDICIAL DECISIONS

## 1. In general.

After the supreme court remanded defendant's matter for resentencing and the circuit court resentedenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. *Foster v. State*, — So. 2d —, 2007 Miss. LEXIS 315 (Miss. May 31, 2007).

This section is reserved for the event

when either the Supreme Court of Mississippi or the United States Supreme Court makes a "wholesale declaration" that the death penalty in general, and/or Mississippi's statutory death penalty scheme in particular, is unconstitutional; this section is not intended for use on a case by case basis by trial courts or the Supreme Court in conjunction with an analysis with respect to the requirement, as a prerequisite to imposition of a death sentence, of a finding beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing occurred, or contemplated that lethal force would be used. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).



## RESEARCH REFERENCES

**ALR.** Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.S. §§ 3591 et seq. 195 A.L.R. Fed. 1.

## VICTIM IMPACT STATEMENT ACT

SEC.	
99-19-151.	Short title.
99-19-153.	Declaration of purpose.
99-19-155.	Definitions.
99-19-157.	Victim impact statement.
99-19-159.	Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.
99-19-161.	Notice to victim prior to sentencing.

## § 99-19-151. Short title.

Sections 99-19-151 through 99-19-161 shall be known and may be cited as "The Victim Impact Statement Act."

**SOURCES:** Laws, 1987, ch. 433, § 1, eff from and after July 1, 1987.

## § 99-19-153. Declaration of purpose.

(1) The Legislature finds and declares that:

(a) Protection of the public, restitution to the crime victim and the crime victim's family and just punishment for the harm inflicted are primary objectives of the sentencing process;

(b) The financial, emotional and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;

(c) In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and

(d) The victim of the crime or a relative of the victim is usually in the best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

(2) Therefore, the Legislature declares that the purpose of Sections 99-19-151 through 99-19-161 is to provide the sentencing court with a victim impact statement prior to sentencing a convicted offender who has caused physical, emotional or financial harm to a victim as defined herein.

**SOURCES:** Laws, 1987, ch. 433, § 2, eff from and after July 1, 1987.

## JUDICIAL DECISIONS

### 1. Consideration of victim impact evidence proper.

In a forgery case, a court properly considered victim impact evidence that defendant threatened to kill the victim and her family should she ever help send him to jail, because Miss. Code Ann. § 99-19-153 did not restrict the contents of the victim impact statement to the “financial, emotional and physical” effect of a criminal act on the victim, but instead stated that

those were among the essential factors to be considered in sentencing. Defendant’s statements indicated a heightened degree of savagery and capacity to inflict emotional damage on the victim, and subsequent to the crime involved, the victim had to change her phone number because of harassing calls from defendant and his family. *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

### § 99-19-155. Definitions.

For the purposes of Sections 99-19-151 through 99-19-161, the following words shall have the meanings ascribed herein, unless the context otherwise requires:

(a) “Victim” means an individual who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a felony or an immediate family member of a minor victim or a homicide victim.

(b) “Victim impact statement” means a statement providing information about the financial, emotional and physical effects of the crime on the victim and the victim’s family, and specific information about the victim, the circumstances surrounding the crime and the manner in which it was perpetrated.

(c) “Victim representative” means a spouse, parent, child, sibling or other relative of a deceased or incapacitated victim or of a victim who is under fourteen (14) years of age, or a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative.

**SOURCES:** Laws, 1987, ch. 433, § 3, eff from and after July 1, 1987.

## JUDICIAL DECISIONS

1. Purpose of statement.
2. Inappropriate content of statement.

### 1. Purpose of statement.

One of the principal purposes of a victim impact statement is to provide information to the court about the direct impact of the crime on the victim in order to better aid the trial court in imposing “just punishment.” *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. Jan. 21, 2003), rev’d on other grounds, *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

### 2. Inappropriate content of statement.

In a case where the inmate was convicted of two counts of uttering a forgery, pursuant to Miss. Code Ann., § 99-19-155(b), the contents of the victim’s impact statement relating to alleged threats of harm to the victim and her family made 10 years before were improperly admitted at the sentencing hearing and a reasonably competent attorney would find it necessary in the vigorous defense of his client’s rights to make some effort to exclude

or, at least, counteract such a damaging victim impact statement; thus, trial counsel's failure to do so caused his standard of representation to fall below that required by Strickland and the trial court's decision denying an evidentiary hearing on the inmate's motion for post-conviction relief from his judgment of sentence was reversed. *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. 2003), rev'd *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

While it cannot be doubted that a wide-ranging number of factors may be considered by the trial court in determining an appropriate measure of punishment, it remains that, under the clear wording of Miss. Code Ann. § 99-19-155(b), a victim impact statement can properly provide

only a specifically limited portion of the relevant information relating to the financial, emotional, and physical effects of the crime on the victim and the victim's family, and specific information about the victim, the circumstances surrounding the crime, and the manner in which it was perpetrated; thus, alleged 10-year-old death threats or threats of serious bodily injury, could not by any imaginable stretch, be said to fall under the circumstances surrounding the crime of issuing two forged checks drawn on the victim's checking account and that evidence was improperly admitted in the inmate's case. *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. 2003), rev'd *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

### § 99-19-157. Victim impact statement.

(1) If a court orders the preparation of a presentence evaluation report on a defendant in a felony case, the presentence investigator shall prepare a written victim impact statement for the court which shall be appended to such report. The statement shall include applicable information obtained during consultation with the victim or the victim representative. If the victim or victim representative cannot be located or declines to cooperate in the preparation of the statement, the presentence investigator shall include a notation to that effect in the statement. If there are multiple victims and preparation of individual victim impact statements is not feasible, the presentence investigator may submit one or more representative statements.

(2) If a court does not order the preparation of a presentence evaluation report on a defendant in a felony case, the victim or victim representative may also submit a victim impact statement in one or both of the following ways:

(a) With the permission of the trial court, the victim may present an oral victim impact statement at any sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.

(b) The victim may submit a written statement to the prosecuting attorney, who shall present such statement to the trial judge prior to sentencing.

**SOURCES:** Laws, 1987, ch. 433, § 4, eff from and after July 1, 1987.

**Cross References** — Requirement that personnel of division of community services prepare written victim impact statements at the request of a sentencing judge, see § 47-7-9.



## RESEARCH REFERENCES

**ALR.** Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Victim impact evidence in capital sentencing hearings — post-Payne v. Tennessee. 79 A.L.R.5th 33.

## JUDICIAL DECISIONS

## 1. In general.

Victim's sister testified as to the victim's role in her family and the community that the victim moved to help her daughter raise her granddaughter in the country, and how the sister has now had to assume the victim's role as head of the family. The victim impact evidence offered was proper

and necessary to a development of the case and true characteristics of the victim and could not serve in any way to incite the jury; thus, it was properly admitted. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

**§ 99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.**

(1) At least forty-eight (48) hours prior to the date of sentencing, the court shall make available copies of the statement to the defendant, defendant's counsel and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

(2) Any victim impact statement submitted to the court under Section 99-19-157 shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant.

(3) Sections 99-19-151 through 99-19-161 shall not be construed to require a victim or victim representative to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.

**SOURCES:** Laws, 1987, ch. 433, § 5, eff from and after July 1, 1987.

## JUDICIAL DECISIONS

## 1. In general.

## 2. Improper use.

## 1. In general.

In a forgery case, a court properly considered victim impact evidence that defendant threatened to kill the victim and her family should she ever help send him to jail, because Miss. Code Ann. § 99-19-153 did not restrict the contents of the victim impact statement to the "financial, emotional and physical" effect of a criminal act on the victim, but instead stated that those were among the essential factors to

be considered in sentencing. Defendant's statements indicated a heightened degree of savagery and capacity to inflict emotional damage on the victim, and subsequent to the crime involved, the victim had to change her phone number because of harassing calls from defendant and his family. *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

Eighth Amendment does not prohibit prosecutor from arguing, or jury from considering, at sentencing phase of capital trial, "victim impact" evidence relating to victim's personal characteristics and emo-

tional impact of murder on victim's family; assessment of harm resulting from crime has long been important concern of criminal law in determining elements of offense and appropriate punishment, and victim impact evidence is merely means of informing sentencing authority as to specific harm caused by crime; contrary decision of *Booth v. Maryland* (1987) 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207, are overruled to extent they conflict with this decision. *Payne v. Tennessee*, 501

U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), reh'g denied, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1110 (1991).

## 2. Improper use.

As an apparent safeguard against the improper use of a victim impact statement, the law requires that the statement be submitted at least 48 hours in advance of the sentencing date to the defendant and to defendant's counsel. *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. Jan. 21, 2003), rev'd on other grounds, *Swidle v. State*, 881 So. 2d 174 (Miss. 2004).

## RESEARCH REFERENCES

**ALR.** Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Victim impact evidence in capital sentencing hearings — post-*Payne v. Tennessee*. 79 A.L.R.5th 33.

## § 99-19-161. Notice to victim prior to sentencing.

The prosecuting attorney shall notify the victim or the victim representative in writing of the date, time and place of any sentencing hearing. If a sentencing hearing is not ordered by the trial judge, the prosecuting attorney shall notify the victim or the victim representative of his right to prepare a written victim impact statement to be considered by the trial judge prior to sentencing. A copy of any relevant rules and regulations pertaining to the victim impact statement and the hearing shall accompany the notice. The notice and the copy of any relevant rules and regulations shall be sent to the last known address of the victim or the victim representative at least five (5) days prior to the sentencing hearing.

**SOURCES:** Laws, 1987, ch. 433, § 6, eff from and after July 1, 1987.

## RESEARCH REFERENCES

**ALR.** Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

## HIV AND AIDS TESTING OF PERSONS CONVICTED OF SEX OFFENSES

- SEC.  
 99-19-201. Definitions.  
 99-19-203. Testing of persons convicted of sex offenses for HIV and AIDS.

**§ 99-19-201. Definitions.**

The following terms shall have the meanings ascribed to them herein unless the context requires otherwise:

(a) "AIDS" means acquired immunodeficiency syndrome, AIDS related complex and any similar disease.

(b) "HIV" means the human immunodeficiency virus or any other identified causative agent of AIDS.

(c) "Sex offense" means any offense described in Section 45-33-23 or any offense involving the crime of rape.

(d) "Test" means a test to determine the presence of the AIDS disease or the presence of the antibody or antigen to HIV or the presence of HIV infection.

**SOURCES:** Laws, 1991, ch. 425, § 1; Laws, 2000, ch. 499, § 29, eff from and after July 1, 2000.

**Cross References** — Registration of sex offenders, see Chapter 33 of Title 45.

**§ 99-19-203. Testing of persons convicted of sex offenses for HIV and AIDS.**

Any person who is convicted of a sex offense on or after July 1, 1994, and who is sentenced to any state or local correctional facility, placed on probation, given a suspended sentence or other disposition shall be tested for HIV and AIDS by the State Department of Health in conjunction with the State Department of Corrections. An offender who is confined for more than ninety (90) days shall be tested for HIV and AIDS within thirty (30) days before the date of such offender's release. The results of any positive HIV or AIDS tests shall be reported to the victim(s) of such offense and the offender. Any positive HIV or AIDS test results shall also be reported to the victim's spouse and to the spouse of the person who is convicted of such sex offense, if either or both of them are lawfully married. The State Department of Health shall provide counseling and the referral to appropriate treatment for victim(s) of a sex offense where the convicted offender tested positive for HIV or AIDS.

**SOURCES:** Laws, 1991, ch. 425, § 2; Laws, 1994, ch. 504, § 1, eff from and after July 1, 1994.

**Cross References** — Registration of sex offenders, see §§ 45-33-1 et seq.

**RESEARCH REFERENCES**

**ALR.** State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS). 12 A.L.R.5th 149.

Damage action for HIV testing without consent of person tested. 77 A.L.R.5th 541.



## ENHANCED PENALTIES FOR OFFENSES COMMITTED FOR DISCRIMINATORY REASONS

SEC.

- 99-19-301. Penalties subject to enhancement.  
 99-19-303. Notice of enhancement.  
 99-19-305. Sentencing proceedings; required findings for enhanced penalty.  
 99-19-307. Amount penalty may be enhanced.

### § 99-19-301. Penalties subject to enhancement.

The penalty for any felony or misdemeanor shall be subject to enhancement as provided in Sections 99-19-301 through 99-19-307 if the felony or misdemeanor was committed because of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim.

**SOURCES:** Laws, 1994, ch. 572, § 1, eff from and after July 1, 1994.

### RESEARCH REFERENCES

**ALR.** Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

### § 99-19-303. Notice of enhancement.

(1) For enhancement of the penalty for a felony offense to apply, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide notice upon the information or indictment that the prosecutor will seek the enhanced penalty provided in Sections 99-19-301 through 99-19-307. The notice shall be in a clause separate from and in addition to the substantive offense charged and shall not be considered as an element of the offense charged.

(2) For enhancement of the penalty for a misdemeanor to apply, the affiant, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide written notice that the enhanced penalty will be sought as provided in Sections 99-19-301 through 99-19-307. The notice shall be in a clause separate from and in addition to the substantive offense charge and shall not be considered as an element of the offense charged.

(3) There shall be no mention in the guilt or innocence phase of the trial or in any documents or evidence seen by the jury that an enhanced penalty may be sought.

**SOURCES:** Laws, 1994, ch. 572, § 2, eff from and after July 1, 1994.

### RESEARCH REFERENCES

**ALR.** Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

**§ 99-19-305. Sentencing proceedings; required findings for enhanced penalty.**

(1) Upon conviction or adjudication of guilt of a defendant where notice has been duly given that an enhanced penalty will be sought as provided in Sections 99-19-301 through 99-19-307, the court shall conduct a separate sentencing proceeding to determine the sentence. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge shall summon a jury to determine whether an enhanced penalty should be imposed. If trial by jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. Provided, however, that if the defendant enters a plea of guilty and waives trial by jury for the sentencing proceeding, the sentencing proceeding shall be conducted before the trial judge sitting without a jury. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant or his counsel or both defendant and counsel shall be permitted to present arguments for or against any sentence sought.

(2) In order to impose an enhanced penalty under the provisions of Sections 99-19-301 through 99-19-307, the jury must find beyond a reasonable doubt:

(a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and

(b) That the defendant maliciously and with specific intent committed the offense because the victim was within the class delineated.

(3) That the victim was within the class delineated means that the reason the underlying crime was committed was the victim's actual or perceived race, color, religion, ethnicity, ancestry, national origin or gender.

**SOURCES:** Laws, 1994, ch. 572, § 3, eff from and after July 1, 1994.

**RESEARCH REFERENCES**

**ALR.** Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

**§ 99-19-307. Amount penalty may be enhanced.**

In the event it is found beyond a reasonable doubt that the offense was committed by reason of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim, then the penalty for the offense may be enhanced by punishment for a term of imprisonment of up to twice that authorized by law for the offense committed, or a fine of up to twice that authorized by law for the offense committed, or both.

**SOURCES:** Laws, 1994, ch. 572, § 4, eff from and after July 1, 1994.

**Cross References** — Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

### RESEARCH REFERENCES

**ALR.** Validity, construction, and effect of “hate crimes” statutes, “ethnic intimidation” statutes, or the like. 22 A.L.R.5th 261.

## ENHANCED PENALTIES FOR CRIMES COMMITTED AGAINST ELDERLY PERSONS

SEC.

- 99-19-351. Penalties subject to enhancement.
- 99-19-353. Notice of enhancement.
- 99-19-355. Sentencing proceedings; required findings for enhanced penalty.
- 99-19-357. Amount penalty may be enhanced.

### § 99-19-351. Penalties subject to enhancement.

The penalty for any felony or misdemeanor which is a crime of violence or the crime of burglary or breaking and entering the dwelling of another shall be subject to enhancement as provided in Sections 99-19-351 through 99-19-357 if the felony or misdemeanor was committed against any victim who is sixty-five (65) years of age or older or who is disabled as described in 42 USCS 12102.

**SOURCES:** Laws, 2001, ch. 315, § 1; Laws, 2007, ch. 589, § 12, eff from and after July 1, 2007.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference near the end of the paragraph. The phrase “this act” was changed to “Sections 99-19-351 through 99-19-357”. The Joint Committee ratified the correction at its June 3, 2003 meeting.

**Amendment Notes** — The 2007 amendment added “or who is disabled as described in 42 USCS 12102” at the end of the section.

**Federal Aspects** — 42 USCS §§ 12102, referred to in this section, is known as the Americans with Disabilities Act of 1990.

### § 99-19-353. Notice of enhancement.

(1) For enhancement of the penalty for a felony offense to apply, the prosecuting attorney, if the defendant is charged by information, or grand jury, if an indictment is returned, shall provide notice upon the information or indictment that the prosecutor will seek the enhanced penalty provided in Sections 99-19-351 through 99-19-357. The notice shall be in a clause separate from and in addition to the substantive offense charged and shall not be considered as an element of the offense charged.

(2) For enhancement of the penalty for a misdemeanor to apply, the affiant, the prosecuting attorney, if the defendant is charged by information, or



grand jury, if an indictment is returned, shall provide written notice that the enhanced penalty will be sought as provided in Sections 99-19-351 through 99-19-357. The notice shall be in a clause separate from and in addition to the substantive offense charge and shall not be considered as an element of the offense charged.

(3) There shall be no mention in the guilt or innocence phase of the trial or in any documents or evidence seen by the jury that an enhanced penalty may be sought.

**SOURCES:** Laws, 2001, ch. 315, § 2, eff from and after July 1, 2001.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected two references. The phrase “this act” was changed to “Sections 99-19-351 through 99-19-357”. The Joint Committee ratified the correction at its June 3, 2003 meeting.

### **§ 99-19-355. Sentencing proceedings; required findings for enhanced penalty.**

(1) Upon conviction or adjudication of guilt of a defendant where notice has been duly given that an enhanced penalty will be sought as provided in Sections 99-19-351 through 99-19-357, the court shall conduct a separate sentencing proceeding to determine the sentence. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge shall summon a jury to determine whether an enhanced penalty should be imposed. If trial by jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. If the defendant enters a plea of guilty and waives trial by jury for the sentencing proceeding, the sentencing proceeding shall be conducted before the trial judge sitting without a jury. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant, or his counsel, or both defendant and counsel, shall be permitted to present arguments for or against any sentence sought.

(2) In order to impose an enhanced penalty under the provisions of Sections 99-19-351 through 99-19-357, the jury must find beyond a reasonable doubt:

(a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and

(b) That the defendant maliciously and with specific intent committed the offense to any victim who is sixty-five (65) years of age or older or who is disabled as described in 42 USCS 12102.

**SOURCES:** Laws, 2001, ch. 315, § 3; Laws, 2007, ch. 589, § 13, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment added “or who is disabled as described in 42 USCS 12102” at the end of (2)(b).

**Federal Aspects** — 42 USCS §§ 12102, referred to in this section, is known as the Americans with Disabilities Act of 1990.

**§ 99-19-357. Amount penalty may be enhanced.**

The penalty for the offense may be enhanced by punishment for a term of imprisonment of up to twice that authorized by law for the offense committed, or a fine of up to twice that authorized by law for the offense committed, or both.

**SOURCES:** Laws, 2001, ch. 315, § 4, eff from and after July 1, 2001.

**Cross References** — Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

## CHAPTER 20

### Community Service Restitution

#### SEC.

- 99-20-1. Short title; purpose.
- 99-20-3. Participation in community service restitution program.
- 99-20-5. Qualifications for participation in program.
- 99-20-7. Determining persons eligible for participation; review of district attorney's files.
- 99-20-9. Notification of eligible persons; request for sentence to program; recommendations of victim.
- 99-20-11. Agreement to and acceptance of sentence by defendant; conditional discharge.
- 99-20-13. Participant informed of possible criminal sentence; consequences of failure to perform community service sentence.
- 99-20-15. Written agreement between program participant and department of corrections.
- 99-20-17. Failure to complete sentence; consequences.
- 99-20-19. Availability of program.

#### § 99-20-1. Short title; purpose.

This chapter shall be known as the Mississippi Community Service Restitution Act. The purpose of this chapter is to provide an alternative method of punishment in cases in which the defendant would have otherwise been sentenced to a term of imprisonment.

**SOURCES:** Laws, 1983, ch. 447, § 1; reenacted, 1987, ch. 367, § 1, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victim generally, see §§ 99-37-1 et seq.

#### § 99-20-3. Participation in community service restitution program.

Any defendant who qualifies for participation as set out in this chapter, shall be entitled to participate in a community service restitution program. Any convicted defendant who, having been sentenced prior to July 1, 1983, and who qualifies for participation in the program herein established, may petition the circuit court of the county of his conviction to be sentenced under the provisions of this chapter.

**SOURCES:** Laws, 1983, ch. 447, § 2; reenacted, 1987, ch. 367, § 2, eff from and after July 1, 1987.



**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

### RESEARCH REFERENCES

**ALR.** Propriety, under 18 USCS § 3651, of district court's requiring contribution of money or services to charity or to community service as condition of suspending sentence and granting probation. 66 A.L.R. Fed. 825.

### § 99-20-5. Qualifications for participation in program.

In order to qualify for participation in a community service restitution program, the defendant must: (a) be a first offender, (b) be convicted of a nonviolent offense that would constitute a felony and (c) not have drug, alcohol or emotional problems so serious that he or she appears unlikely to be able to meet the obligations of the community service sentence.

**SOURCES:** Laws, 1983, ch. 447, § 3; reenacted, 1987, ch. 367, § 3; Laws, 1999, ch. 382, § 1, eff from and after July 1, 1999.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Duty of department of corrections to notify both district and defense attorneys of persons eligible for participation in community restitution program, see § 99-20-9.

Restitution to victims generally, see §§ 99-37-1 et seq.

### RESEARCH REFERENCES

**ALR.** Propriety, under 18 USCS § 3651, of district court's requiring contribution of money or services to charity or to community service as condition of suspending sentence and granting probation. 66 A.L.R. Fed. 825.

### § 99-20-7. Determining persons eligible for participation; review of district attorney's files.

Department of Corrections personnel shall review the incoming files in the office of district attorney in the circuit court district in which they are operating, to determine which, if any, of the persons charged are eligible for participation in the community service restitution program.

**SOURCES:** Laws, 1983, ch. 447, § 4; reenacted, 1987, ch. 367, § 4, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — General powers and duties of department of corrections, see § 47-5-10.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

## **§ 99-20-9. Notification of eligible persons; request for sentence to program; recommendations of victim.**

When a case appears to meet the eligibility criteria established in Section 99-20-5, the Department of Corrections representative shall notify the district attorney of that district and the defense attorney.

The Department of Corrections representative, the district attorney and the defense attorney shall request the court to sentence the defendant to the community service restitution program. The Department of Corrections representative shall present to the court its basis for requesting the community service sentence. In addition, the victim, if any, of the crime for which the defendant is charged shall be asked to comment in writing as to whether or not the defendant shall be allowed to enter the program. The court shall not be bound by such recommendations.

**SOURCES:** Laws, 1983, ch. 447, § 5; reenacted, 1987, ch. 367, § 5, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — General powers and duties of department of corrections, see § 47-5-10.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

## **JUDICIAL DECISIONS**

### **1. In general.**

As noted in this section, the court is not bound by the recommendations of a Department of Corrections representative. *Johnson v. State*, 461 So. 2d 1288 (Miss. 1984).

## **§ 99-20-11. Agreement to and acceptance of sentence by defendant; conditional discharge.**

If a determination is made to use the community service sentence, the defendant must agree to and accept the determination.

Any defendant who is sentenced to the community service restitution program shall receive a conditional discharge from the presiding court and

shall be sentenced to perform a certain number of hours of unpaid community service, in the sentencing court's discretion.

If a determination is made to use the community service sentence, the defendant must agree to and accept the determination.

Any defendant who is sentenced to the community service restitution program shall receive a conditional discharge from the presiding court and shall be sentenced to perform a certain number of hours of unpaid community service, in the sentencing court's discretion.

**SOURCES:** Laws, 1983, ch. 447, § 6; reenacted, 1987, ch. 367, § 6, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

## RESEARCH REFERENCES

**ALR.** Propriety, under 18 USCS § 3651, of district court's requiring contribution of money or services to charity or to community service as condition of suspending sentence and granting probation. 66 A.L.R. Fed. 825.

### § 99-20-13. Participant informed of possible criminal sentence; consequences of failure to perform community service sentence.

Upon sentencing to the community service restitution program, the judge shall instruct the defendant as to what the sentence would have been had he or she not been placed in the community service restitution program, and shall inform the defendant as to consequences of failure to perform the community service sentence.

**SOURCES:** Laws, 1983, ch. 447, § 7; reenacted, 1987, ch. 367, § 7, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

### § 99-20-15. Written agreement between program participant and department of corrections.

If the court imposes the community service sentence, a written agreement



shall be immediately executed by the defendant and the Department of Corrections representative. The agreement shall contain such provisions and conditions as the Department of Corrections and the court shall deem just and appropriate.

**SOURCES:** Laws, 1983, ch. 447, § 8; reenacted, 1987, ch. 367, § 8, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — General powers and duties of department of corrections, see § 47-5-10.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

### § 99-20-17. Failure to complete sentence; consequences.

Upon failure to complete the community service sentence, the case shall be restored to the court calendar for resentencing and a warrant for the arrest of the defendant shall immediately be issued.

**SOURCES:** Laws, 1983, ch. 447, § 9; reenacted, 1987, ch. 367, § 9, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

### § 99-20-19. Availability of program.

This alternative method of punishment shall be available only in circuit court districts where the Department of Corrections Commissioner certifies that such a program exists, can be enforced and that space is available in such program.

**SOURCES:** Laws, 1983, ch. 447, § 10; reenacted, 1987, ch. 367, § 10, eff from and after July 1, 1987.

**Editor's Note** — Laws of 1983, ch. 447, § 11, provided that this section would stand repealed from and after July 1, 1987. Subsequently, Section 11, ch. 367, Laws of 1987, reenacted and amended Section 11, ch. 447, Laws of 1983, by removing the provision for repeal.

**Cross References** — General powers and duties of department of corrections, see § 47-5-10.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Restitution to victims generally, see §§ 99-37-1 et seq.

## CHAPTER 21

### Fugitives From Other States

SEC.	
99-21-1.	Warrant for arrest of fugitives.
99-21-3.	Bail.
99-21-5.	Bonds to be filed with circuit clerk.
99-21-7.	Committing officer to notify governor.
99-21-9.	Appearance before circuit court.
99-21-11.	Person causing arrest liable for costs; deposit or security may be required.

#### § 99-21-1. Warrant for arrest of fugitives.

Any conservator of the peace, upon complaint on oath made before him, or on other satisfactory evidence, that any person within this state has committed treason, felony, or other crime in some other state or territory, and has fled from justice may issue a warrant for the arrest of such person as if the offense had been committed in this state.

**SOURCES:** Codes, 1880, § 3120; 1892, § 1470; Laws, 1906, § 1542; Hemingway's 1917, § 1304; Laws, 1930, § 1330; Laws, 1942, § 2577.

**Cross References** — Duty of governor to order arrest and delivery of fugitives from justice in other states, see § 7-1-25.

Expenses of returning felon, see § 25-7-73.

Aiding and abetting the escape of prisoners, see §§ 97-9-27 et seq.

Arrest of escaped or rescued offender, see § 99-3-15.

Powers and duties of conservators of peace generally, see §§ 99-15-1 through 99-15-11.

### JUDICIAL DECISIONS

#### 1. In general.

Filing of extradition proceedings and granting of extradition by asylum state constitutes prima facie case on behalf of state that it is entitled to extradition; controversy over specific date of alleged crime is question to be litigated in judiciary of demanding state. *Allen v. State*, 515 So. 2d 890 (Miss. 1987).

Introduction of Governor's extradition warrant creates presumption that all requirements for extradition have been met. *Allen v. State*, 515 So. 2d 890 (Miss. 1987).

Executive agreement between Governor of Mississippi and Governor of Minnesota providing for the release of incarcerated prisoner from Mississippi to agents of Minnesota so that prisoner could stand trial in Minnesota on murder charges and thereafter be returned to Mississippi did

not violate prisoner's constitutional rights, as Mississippi law does not provide fugitive with right to hearing prior to extradition and all other requirements for extradition were complied with. *Good v. Allain*, 646 F. Supp. 1029 (S.D. Miss. 1986), aff'd as modified, 823 F.2d 64 (5th Cir. 1987).

In a habeas corpus challenge to the Mississippi governor's extradition of appellee to Missouri, despite a dispute regarding whether an accusatory affidavit was presented to the governor, the Missouri governor's warrant for appellee's arrest established prima facie basis for extradition and the appellee failed to prove its insufficiency. *Taylor v. Garrison*, 329 So. 2d 506 (Miss. 1976).

Affidavit charging petitioner with being fugitive from justice held in due and

proper form. *Wall v. Quin*, 148 Miss. 335, 114 So. 744 (1927).

Warrant for arrest of petitioner as fugitive from justice, commanding that he be forthwith arrested and brought before jus-

tice, made warrant returnable instanter, and no other return day was required. *Wall v. Quin*, 148 Miss. 335, 114 So. 744 (1927).

### RESEARCH REFERENCES

**ALR.** Extradition of juveniles. 73 A.L.R.3d 700.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings. 90 A.L.R.3d 1085.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS). 12 A.L.R.5th 149.

Arrest and transportation of fugitive without extradition proceedings as violation of civil rights actionable under 42 USCS § 1983. 45 A.L.R. Fed. 872.

**Am Jur.** 5 Am. Jur. 2d, Arrest § 46.

8 Am. Jur. Legal Forms 2d, Extradition §§ 107:11 et seq. (requisition by demanding state); §§ 107:31 et seq. (arrest and surrender by asylum state).

**CJS.** 6A C.J.S., Arrest §§ 9, 14.

**Lawyers' Edition.** Interstate extradition: Supreme Court's construction of Extradition Act (18 USCS § 3182, and similar predecessor provisions) and of extradition clause (Art IV, § 2, cl 2) of Federal Constitution. 96 L. Ed. 2d 750.

### § 99-21-3. Bail.

If it shall appear to the conservator of the peace before whom the fugitive shall be brought, that there is reasonable cause to believe that the complaint is true, he shall, if the prisoner would be entitled to bail if the offense had been committed in this state, require him to furnish bail to appear before the circuit court of the county at its next term, and from day to day and term to term until discharged by law. If such person do not give bail with sufficient sureties as required, he shall be committed to jail until he give such bail, or until he be discharged as hereinafter provided. If such person would not be bailable if the offense charged had been committed in this state, he shall be committed to jail to remain until discharged as provided by law.

**SOURCES:** Codes, 1880, § 3131; 1892, § 1471; Laws, 1906, § 1543; Hemingway's 1917, § 1305; Laws, 1930, § 1331; Laws, 1942, § 2578.

**Cross References** — Powers and duties of conservators of peace generally, see §§ 99-15-1 through 99-15-11.

### RESEARCH REFERENCES

**Lawyers' Edition.** Interstate extradition: Supreme Court's construction of Extradition Act (18 USCS § 3182, and simi-

lar predecessor provisions) and of extradition clause (Art IV, § 2, cl 2) of Federal Constitution. 96 L. Ed. 2d 750.



### § 99-21-5. Bonds to be filed with circuit clerk.

Any bond or recognizance taken shall be delivered at once to the clerk of the circuit court before which the party is bound to appear, and, in case of forfeiture, like proceedings shall be had thereon as in other cases.

**SOURCES:** Codes, 1880, § 3122; 1892, § 1472; Laws, 1906, § 1544; Hemingway's 1917, § 1306; Laws, 1930, § 1332; Laws, 1942, § 2579.

**Cross References** — Circuit clerks generally, see §§ 9-7-121 et seq.

### § 99-21-7. Committing officer to notify governor.

The conservator of the peace bailing or committing such person shall immediately report the fact to the governor of this state.

**SOURCES:** Codes, 1880, § 3123; 1892, § 1473; Laws, 1906, § 1545; Hemingway's 1917, § 1307; Laws, 1930, § 1333; Laws, 1942, § 2580.

**Cross References** — Powers and duties of conservators of peace generally, see §§ 99-15-1 through 99-15-11.

### § 99-21-9. Appearance before circuit court.

If the person bound appear before the circuit court according to his obligation, he shall be discharged by the court, unless he be demanded by some person authorized by the governor of this state to demand him, or unless the court shall commit him if he were improperly admitted to bail, or shall require him to give a new bond or recognizance if his bail be insufficient, or shall order his bond or recognizance at first given to continue in force for a longer time; but any such person may at any time be taken into custody by any person authorized by the governor of this state, and such taking into custody shall be a discharge from any bail he may have given.

**SOURCES:** Codes, 1880, § 3124; 1892, § 1474; Laws, 1906, § 1546; Hemingway's 1917, § 1308; Laws, 1930, § 1334; Laws, 1942, § 2581.

**Cross References** — Inapplicability of Mississippi Rules of Evidence to proceedings for extradition or rendition, see Miss. R. Evid. 1101.

## JUDICIAL DECISIONS

### 1. In general.

Executive agreement between Governor of Mississippi and Governor of Minnesota providing for the release of incarcerated prisoner from Mississippi to agents of Minnesota so that prisoner could stand trial in Minnesota on murder charges and thereafter be returned to Mississippi did

not violate prisoner's constitutional rights, as Mississippi law does not provide fugitive with right to hearing prior to extradition and all other requirements for extradition were complied with. *Good v. Allain*, 646 F. Supp. 1029 (S.D. Miss. 1986), *aff'd as modified*, 823 F.2d 64 (5th Cir. 1987).

**§ 99-21-11. Person causing arrest liable for costs; deposit or security may be required.**

The person making complaint to procure the arrest of any person charged with crime in some other state or territory, shall be answerable for all the costs of the arrest and proceedings, and for the jail fees, if the person be committed to jail; and the conservator of the peace applied to may require such deposit of money, or other security for the payment of all costs, charges, and fees in such proceedings, as he thinks reasonable, and may refuse to issue a warrant or commit the person to jail, or do anything in such matter until compliance with the requirement.

**SOURCES:** Codes, 1880, § 3125; 1892, § 1475; Laws, 1906, § 1547; Hemingway's 1917, § 1309; Laws, 1930, § 1335; Laws, 1942, § 2582.

**Cross References** — Powers and duties of conservators of peace generally, see §§ 99-15-1 through 99-15-11.

## CHAPTER 23

### Peace Bonds

#### SEC.

- 99-23-1. Complaint; warrant of arrest; condition of bond.
- 99-23-3. Payment of costs.
- 99-23-5. Discharge or commitment of accused.
- 99-23-7. Appeal to circuit court and proceedings therein.
- 99-23-9. Costs in circuit court.
- 99-23-11. Judgment after failure to prosecute appeal.
- 99-23-13. Certain bonds to be delivered to justice court; proceeding for breach; delivery to circuit court on appeal.
- 99-23-15. Bonds over two hundred dollars returned to circuit clerk.
- 99-23-17. Grand jury to inquire and report on breach of bonds.
- 99-23-19. District attorney to institute proceedings to forfeit bonds.
- 99-23-21. Proceedings to collect forfeited bonds.
- 99-23-23. What constitutes breach of bond; proof.
- 99-23-25. Sureties may surrender their principal.
- 99-23-27. Person convicted of crime less than felony may be made to give peace bond.
- 99-23-29. Form of affidavit to obtain security to keep the peace.
- 99-23-31. Form of bond to keep the peace.

#### § 99-23-1. Complaint; warrant of arrest; condition of bond.

Whenever complaint is made under oath by a credible person to a justice of the peace that any person has threatened to commit an offense against the person or property of another, and such justice is satisfied that there is good reason to fear the commission of such offense, he may issue a warrant to arrest and bring the person complained of before him or some other justice of the peace; and the justice of the peace before whom such person may be brought shall examine into the charge, and if there be just reason to apprehend that such person will commit the offense, he shall be required by the justice to enter into bond in such sum, with such sureties, and for such time not exceeding twelve months, as the justice may prescribe, conditioned to keep the peace toward the person against whom or whose property there is reason to fear the offense may be committed.

**SOURCES:** Codes, 1880, § 3126; 1892, § 1476; Laws, 1906, § 1548; Hemingway's 1917, § 1310; Laws, 1930, § 1336; Laws, 1942, § 2583.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Bail to keep the peace required of arrested person about to duel, see § 97-39-9.

Criminal jurisdiction of justice court judges, see § 99-33-1.



## JUDICIAL DECISIONS

### 1. In general.

The state and not the party making the affidavit is the sole beneficiary of a bond to keep the peace. *State ex rel. Reed v. Boutwell*, 123 Miss. 666, 86 So. 454 (1920).

The venue of a justice of the peace under this section [Code 1942, § 2583] is in the county where the threats or hostile actions occur. *Ford v. State*, 96 Miss. 85, 50 So. 497 (1909).

## RESEARCH REFERENCES

**Am Jur.** 12 *Am. Jur. 2d*, *Breach of Peace and Disorderly Conduct* §§ 39 et seq.

**CJS.** 11 *C.J.S.*, *Breach of the Peace* §§ 14 et seq.

### § 99-23-3. Payment of costs.

If, on examination, it shall not appear that there is just cause to fear that an offense will be committed by the party complained of, he shall be discharged, and the person who made the complaint shall be taxed with the costs, for which execution may be issued. But if it shall appear that the defendant had threatened to commit an offense, or had so acted as to justify the apprehensions of the person complaining that there was danger of the commission of an offense, the party complained of shall be taxed with the costs of the proceeding, although he may not be required to give bond; and, if he shall be required to furnish bond, he shall be taxed with all costs, for which execution may be issued.

**SOURCES:** Codes, 1880, § 3127; 1892, § 1477; Laws, 1906, § 1549; *Hemingway's* 1917, § 1311; Laws, 1930, § 1337; Laws, 1942, § 2584.

## RESEARCH REFERENCES

**Am Jur.** 12 *Am. Jur. 2d*, *Breach of Peace and Disorderly Conduct* § 49.

**CJS.** 11 *C.J.S.*, *Breach of the Peace* §§ 20, 21.

### § 99-23-5. Discharge or commitment of accused.

If the bond, when required, be given, and the costs be paid, the person shall be discharged from custody, but otherwise he shall be committed to jail until he shall give such bond and pay the costs, or until the expiration of the time for which he was required to furnish security; and in such case the mittimus must state the cause of the commitment, the amount of bail, and the number of sureties required, the time for which the person is to be bound to keep the peace, and the amount of costs taxed against him. He may at any time procure his discharge by giving the required bond, approved by the sheriff of the county, and paying the costs and the jail fees accrued, if any.

**SOURCES:** Codes, 1880, § 3128; 1892, § 1478; Laws, 1906, § 1550; *Hemingway's* 1917, § 1312; Laws, 1930, § 1338; Laws, 1942, § 2585.

### § 99-23-7. Appeal to circuit court and proceedings therein.

Any person aggrieved by a requirement to give security to keep the peace may, at any time while such requirement is in force, appeal to the circuit court, on his application to the justice of the peace and giving bonds as required, with the further condition in the bond that the appellant shall pay all costs, in case it shall be adjudged against him in the circuit court; and thereupon all the papers in the case shall be returned by the justice of the peace to the office of the clerk of the circuit court, and said court shall examine the case anew, and either approve the bond the party gave or discharge him therefrom, or require him to enter a new one to keep the peace, in such sum and for such time not exceeding twelve months, as the court may prescribe, which judgment shall be enforced by committing the party to jail as in other cases of failure to give bail when required, from which he shall be delivered only by giving the required bail, and paying costs and jail fees. But such appeal shall not supersede the judgment requiring a bond to keep the peace, until such judgment shall be reversed by the circuit court.

**SOURCES:** Codes, 1880, § 3129; 1892, § 1479; Laws, 1906, § 1551; Hemingway's 1917, § 1313; Laws, 1930, § 1339; Laws, 1942, § 2586.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

On appeal the question of fact must be tried by the circuit judge. *Ford v. State*, 96 Miss. 85, 50 So. 497 (1909).

One required under this section [Code 1942, § 2586] to give bond for good behavior may appeal to the circuit court. *Jones v. State*, 70 Miss. 398, 12 So. 710 (1893).

## RESEARCH REFERENCES

**Am Jur.** 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct § 48.

**CJS.** 11 C.J.S., Breach of the Peace § 22.

### § 99-23-9. Costs in circuit court.

The circuit court shall render such judgment for costs on the appeal as may be proper against the appellant and the sureties on his bond.

**SOURCES:** Codes, 1880, § 3130; 1892, § 1480; Laws, 1906, § 1552; Hemingway's 1917, § 1314; Laws, 1930, § 1340; Laws, 1942, § 2587.

### § 99-23-11. Judgment after failure to prosecute appeal.

If the appellant take an appeal and do not prosecute it, there shall be judgment on the bond for costs if any are due; and such bond shall stand in full force as security to keep the peace.

**SOURCES:** Codes, 1880, § 3131; 1892, § 1481; Laws, 1906, § 1553; Hemingway's 1917, § 1315; Laws, 1930, § 1341; Laws, 1942, § 2588.

**§ 99-23-13. Certain bonds to be delivered to justice court; proceeding for breach; delivery to circuit court on appeal.**

When the bond required shall not exceed One Thousand Dollars (\$1,000.00), or after July 1, 1986, when such bond shall not exceed Five Hundred Dollars (\$500.00), it shall be retained by the justice court and the proceeding upon its breach shall be instituted at the instance of the aggrieved party by the justice court and shall be, as nearly as may be, as provided for such case in the circuit court. Any such bond taken by the sheriff, and not exceeding the amount stated above, shall be delivered to the clerk of the justice court which required it. If the party giving bond takes an appeal to the circuit court, such bond shall be delivered, with the other papers in the case, to the clerk of the circuit court, as in other cases of appeal, although the amount of the bond shall not exceed the amount stated above, and such bond shall thereafter remain in said court, and for any breach thereof may be prosecuted in said court as if the amount of its penalty exceeded the amount stated above.

**SOURCES:** Codes, 1880, § 3135; 1892, § 1487; Laws, 1906, § 1559; Hemingway's 1917, § 1321; Laws, 1930, § 1347; Laws, 1942, § 2594; Laws, 1981, ch. 471, § 55; Laws, 1982, ch. 423, § 28; Laws, 1985, ch. 478, § 2, eff from and after July 1, 1985.

**§ 99-23-15. Bonds over two hundred dollars returned to circuit clerk.**

All bonds taken as provided in this chapter, and exceeding in amount two hundred dollars, shall be returned by the officer taking them to the office of the clerk of the circuit court of the county on or before the first day of the next term of said court, and shall be by such clerk carefully preserved in his office.

**SOURCES:** Codes, 1880, § 3132; 1892, § 1482; Laws, 1906, § 1554; Hemingway's 1917, § 1316; Laws, 1930, § 1342; Laws, 1942, § 2589.

**Cross References** — Circuit clerks generally, see §§ 9-7-121 et seq.

**§ 99-23-17. Grand jury to inquire and report on breach of bonds.**

It shall be the duty of the clerk of the circuit court, at each term of court, to deliver to the grand jury all peace bonds that have been filed with him or in his office within two (2) years then next past, which bonds shall be returned by the grand jury to said clerk before its final adjournment. It shall be the duty of the grand jury to inquire into whether or not there has been a breach of said bonds, and to notify the district attorney of any breaches. The grand jury shall examine the person at whose instance the bond was required, if he can be found and examined; and it may examine other witnesses. If it finds that there



has been a breach of the bond, it shall furnish the district attorney a list of the witnesses by whom the facts can be established.

**SOURCES:** Codes, 1892, § 1483; Laws, 1906, § 1555; Hemingway's 1917, § 1317; Laws, 1930, § 1343; Laws, 1942, § 2590; Laws, 1983, ch. 499, § 28, eff from and after July 1, 1983.

**Cross References** — Circuit clerks generally, see §§ 9-7-121 et seq.

Duty of district attorney to institute proceedings to collect forfeited bonds, see § 99-23-19.

Proceedings to collect forfeited bonds, see § 99-23-21.

What constitutes breach of bond, see § 99-23-23.

Form of affidavit to obtain security to keep the peace, see § 99-23-29.

Form of peace bond, see § 99-23-31.

### **§ 99-23-19. District attorney to institute proceedings to forfeit bonds.**

It shall be the duty of the district attorney whenever informed by the grand jury, or otherwise reliably, of the breach of any peace bond, to institute proceedings thereon as provided in § 99-23-21.

**SOURCES:** Codes, 1892, § 1484; Laws, 1906, § 1556; Hemingway's 1917, § 1318; Laws, 1930, § 1344; Laws, 1942, § 2591.

**Cross References** — Attendance of district attorney at deliberations of grand jury, see § 25-31-13.

Proceeding to collect forfeited bonds, see § 99-23-21.

What constitutes breach of bond, see § 99-23-23.

### **§ 99-23-21. Proceedings to collect forfeited bonds.**

The mode of proceeding in the case of a breach of bond shall be by scire facias issued by the clerk of the court, on the order of the court or the district attorney, returnable to the court at its next term, requiring the obligors to show cause why the bond shall not be declared forfeited because of the breach of its condition, which shall be recited in the scire facias. Upon the return of the scire facias executed, or of two of such writs "not found" by the sheriff of the county, if sufficient showing be not made to the contrary, judgment may be rendered on such bonds; but the court may remit any part of the amount of such bond, or the judgment rendered thereon, as may be just and reasonable.

**SOURCES:** Codes, 1880, § 3133; 1892, § 1485; Laws, 1906, § 1557; Hemingway's 1917, § 1319; Laws, 1930, § 1345; Laws, 1942, § 2592.

**Cross References** — Circuit clerks generally, see §§ 9-7-121 et seq.

Duty of district attorney to institute proceeding to collect forfeited bonds, see § 99-23-19.

What constitutes breach of bond, see § 99-23-23.

### § 99-23-23. What constitutes breach of bond; proof.

Any offense committed on the person or property of another toward whom the party may have been bound to keep the peace, shall constitute a breach of such bond, which breach may be shown by the record of the conviction of the party of the offense, or by proof of the commission of the offense where conviction has not been had, on proceeding by scire facias, as above provided.

**SOURCES:** Codes, 1880, § 3134; 1892, § 1486; Laws, 1906, § 1558; Hemingway's 1917, § 1320; Laws, 1930, § 1346; Laws, 1942, § 2593.

**Cross References** — Duty of district attorney to institute proceedings to collect forfeited bonds, see § 99-23-19.1.

Proceedings to collect forfeited bonds, see § 99-23-21.

Form of affidavit to obtain security to keep the peace, see § 99-23-29.

Form of peace bond, see § 99-23-31.

### RESEARCH REFERENCES

**Am Jur.** 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct § 43.      **CJS.** 11 C.J.S., Breach of the Peace, §§ 23, 24.

### § 99-23-25. Sureties may surrender their principal.

The sureties of any person bound to keep the peace, may, at any time, surrender their principal to the sheriff of the county in which the principal was bound, under the same rules governing such surrender in criminal cases; and the person surrendered may give a new bond, to be approved by the sheriff, in the same sum and with like sureties as the former, for the residue of the time for which he was bound to keep the peace, and thereupon he shall be discharged.

**SOURCES:** Codes, 1880, § 3136; 1892, § 1488; Laws, 1906, § 1560; Hemingway's 1917, § 1322; Laws, 1930, § 1348; Laws, 1942, § 2595.

**Cross References** — Surrender of principal by bail, see § 99-5-27.

### § 99-23-27. Person convicted of crime less than felony may be made to give peace bond.

Every court before which any person shall be convicted of an offense less than a felony may, in addition to the penalty prescribed by law, require the convict to enter into bond in a reasonable sum, with or without sureties, to keep the peace and to be of good behavior for any time not longer than two years, and may order him to stand committed until such bond be executed; and for any breach thereof it may be proceeded on by scire facias as in other cases.

**SOURCES:** Codes, 1880, § 3138; 1892, § 1489; Laws, 1906, § 1561; Hemingway's 1917, § 1323; Laws, 1930, § 1349; Laws, 1942, § 2596.

**Cross References** — Form of affidavit to obtain security to keep the peace, see § 99-23-29.

Form of peace bond, see § 99-23-31.

## JUDICIAL DECISIONS

1. In general.
2. Particular circumstances.

### 1. In general.

After the final judgment has been imposed the court was in error in requiring an appellant to enter into a bond to keep peace in accordance with this section [Code 1942, § 2596]. *Freeman v. State*, 220 Miss. 777, 72 So. 2d 139 (1954).

Where a person is convicted of an offense less than felony and is required to enter into a bond to keep peace and to be of good behavior this was no violation of the constitution in placing him in double jeopardy for the same offense. *Arnold v. State*, 213 Miss. 667, 57 So. 2d 484 (1952).

This statute simply authorizes an additional penalty for which the defendant is convicted. *City of Jackson v. Belew*, 110 Miss. 243, 70 So. 346 (1915).

An appeal from such judgment operates to supersede the same. *City of Jackson v. Belew*, 110 Miss. 243, 70 So. 346 (1915).

Under this section [Code 1942, § 2596] the judgment of conviction should embrace the requirement to execute the peace bond as a part of said judgment. *Buck v. State*, 103 Miss. 276, 60 So. 321 (1913).

### 2. Particular circumstances.

The trial judge is authorized in his sound discretion to make his own deduction from the evidence when he requires a

good behavior bond, and where in the sentence he orders one who has been convicted of operating a motor vehicle while intoxicated to post the good behavior bond, it will not be set aside as arbitrary. *Arnold v. State*, 213 Miss. 667, 57 So. 2d 484 (1952).

Statute respecting bonds to keep the peace for not longer than two years had no bearing on power to revoke suspension of sentence after two years. *Bolton v. State*, 166 Miss. 290, 146 So. 453 (1933).

Peace bond of \$2,500 required of one convicted of possessing liquor held excessive. *McCluney v. State*, 162 Miss. 333, 138 So. 356 (1931).

Peace bond, without limitation of time, required of one convicted of possessing liquor, held erroneous. *McCluney v. State*, 162 Miss. 333, 138 So. 356 (1931).

A peace bond can be required by order of the court of a defendant on conviction of illegal possession of liquor. *Cox v. State*, 146 Miss. 685, 112 So. 479 (1927).

A defendant convicted of possessing intoxicating liquors may be required to give a peace bond, but one in reasonable amount. In this case \$2,500.00 peace bond declared excessive. *Jones v. State*, 146 Miss. 819, 112 So. 170 (1927).

A case in which a defendant was required to give a fifteen hundred dollar bond to keep the peace held not to be cruel or excessive fine. *Vigouroux v. State*, 136 Miss. 505, 101 So. 576 (1924).

## § 99-23-29. Form of affidavit to obtain security to keep the peace.

"State of Mississippi, \_\_\_\_\_ County.

"Before me, Andrew Sims, a justice of the peace of said county, Sallie Anderson complains on oath that Junius Brown has threatened to beat her (or to tear down her fence, or whatever may be the threatened offense), and she fears he will do as he has threatened, or some other injury to her person or property, and she prays that he may be required to give security to keep the peace toward her.

"Sallie Anderson.



"Sworn to and subscribed before me, the 30th day of November, 1906.

"Andrew Sims, J.P."

**SOURCES:** Codes, 1892, § 1499; Laws, 1906, § 1571; Hemingway's 1917, § 1333; Laws, 1930, § 1359; Laws, 1942, § 2606.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — What constitutes breach of bond, see § 99-23-23.

Form of bond to keep the peace, see § 99-23-31.

## RESEARCH REFERENCES

**Am Jur.** 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct § 46. **CJS.** 11 C.J.S., Breach of the Peace § 16.

### § 99-23-31. Form of bond to keep the peace.

"We, Junius Brown, principal, and Joseph Thorn and Daniel Alderson, his sureties, agree to pay to the State of Mississippi five hundred dollars, unless the said Junius Brown, shall for six months, keep the peace toward the person and property of Sallie Anderson.

"Witness our signatures, the 1st day of December, 1906.

"Junius Brown,

"Joseph Thorn,

"Daniel Alderson.

"Approved by me, 1st day of December, 1906.

"Andrew Sims, J.P. \_\_\_\_\_ County."

**SOURCES:** Codes, 1892, § 1500; Laws, 1906, § 1572; Hemingway's 1917, § 1334; Laws, 1930, § 1360; Laws, 1942, § 2607.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — What constitutes breach of bond, see § 99-23-23.

Form of affidavit to obtain security to keep the peace, see § 99-23-29.

## RESEARCH REFERENCES

**Am Jur.** 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct § 42.

## CHAPTER 25

### Forms

#### SEC.

99-25-1.	Forms provided.
99-25-3.	Affidavit charging crime of murder.
99-25-5.	Warrant.
99-25-7.	Mittimus where bail is denied.
99-25-9.	Mittimus where bail is allowed and not given.
99-25-11.	Entry on docket.
99-25-13.	Proceedings certified to circuit court.
99-25-15.	Affidavit to obtain search warrant.
99-25-17.	Search warrant and capias.

#### § 99-25-1. Forms provided.

Proceedings may be in accordance with the forms set forth in this chapter, where applicable.

**SOURCES:** Codes, 1892, § 1490; Laws, 1906, § 1562; Hemingway's 1917, § 1324; Laws, 1930, § 1350; Laws, 1942, § 2597.

**Cross References** — Naming state as respondent in proceedings under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-9.

#### § 99-25-3. Affidavit charging crime of murder.

"The State of Mississippi, \_\_\_\_\_ County.

"Before me, Andrew Sims, a justice of the peace of the said county, David Owens makes oath that John Jones, on or about the 8th day of July, A.D. 1906, in said county, did feloniously, wilfully, and of malice aforethought, kill and murder Timothy Anderson, against the peace and dignity of the State of Mississippi.

"David Owens.

"Sworn to and subscribed before me, the 9th day of July, 1906. "Andrew Sims,

J.P."

**SOURCES:** Codes, 1892, § 1491; Laws, 1906, § 1563; Hemingway's 1917, § 1325; Laws, 1930, § 1351; Laws, 1942, § 2598.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Murder, capital murder defined, see § 97-3-19.

#### § 99-25-5. Warrant.

"The State of Mississippi.

"To any lawful officer of \_\_\_\_\_ County:

“We command you forthwith to take the body of John Jones, charged with murder in the County of \_\_\_\_\_, and bring him before the undersigned, a justice of the peace of said county, for examination on said charge.

“Witness my hand, the 9th day of July, 1906.

“Andrew Sims, J.P.”

**SOURCES:** Codes, 1892, § 1492; Laws, 1906, § 1564; Hemingway’s 1917, § 1326; Laws, 1930, § 1352; Laws, 1942, § 2599.

**Editor’s Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

A complaint by a sheriff was insufficient to support a finding of a magistrate that there was probable cause for issuance of an arrest warrant, where the complaint stated no more than the sheriff’s conclusion that the named individuals were the persons who committed the offense, and where, although the basis for the sheriff’s

conclusion was a tip from an informant, neither that fact nor any other operative fact was contained in the complaint. *Whiteley v. Warden, Wyo. State Penitentiary*, 58 Ohio Op. 2d 434, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), overruled on other grounds, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

### § 99-25-7. Mittimus where bail is denied.

“The State of Mississippi.

“To the sheriff of \_\_\_\_\_ County:

“We command you to receive and safely keep in jail John Jones, without bail, to answer to the State of Mississippi on a charge of murder, committed in said county, and not bailable according to the judgment of the undersigned, a justice of the peace of said county, before whom said charge has been examined.

“Witness my hand, the 10th day of July, 1906.

“Andrew Sims, J.P.”

**SOURCES:** Codes, 1892, § 1493; Laws, 1906, § 1565; Hemingway’s 1917, § 1327; Laws, 1930, § 1353; Laws, 1942, § 2600.

**Editor’s Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-25-9. Mittimus where bail is allowed and not given.

“The State of Mississippi.

“To the sheriff of \_\_\_\_\_ County:

“We command you to receive and safely keep in jail John Jones, to answer the State of Mississippi on a charge of manslaughter, committed in said county,



as appears by the judgment of the undersigned, a justice of the peace of said county, on an examination thereof, unless the said John Jones shall furnish bail, with sufficient sureties, to be approved by you, in the sum of two thousand five hundred dollars, for his appearance before the circuit court of said county to answer said charge, at its next term and thereafter, until discharged by law, whereupon you shall release him.

“Witness my hand, the 10th day of July, 1906.

“Andrew Sims, J.P.”

**SOURCES:** Codes, 1892, § 1494; Laws, 1906, § 1566; Hemingway’s 1917, § 1328; Laws, 1930, § 1354; Laws, 1942, § 2601.

**Editor’s Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-25-11. Entry on docket.

“The State of Mississippi

v.

Charged with murder.

John Jones.

“Affidavit made 9th July, 1906, and warrant issued for accused same day. July 10th, 1906, accused brought before me and examination of said charge was had, and the accused was required to furnish bail, with sureties, in the sum of two thousand five hundred dollars, for his appearance before the circuit court to answer the charge of manslaughter, and he gave bail as required, with Cyrus Drane and Virgil Field as his sureties, and was thereupon discharged (or, failing to give bail as required, he was committed to jail, or he was committed to jail to be held without bail, as the case may be).”

**SOURCES:** Codes, 1892, § 1495; Laws, 1906, § 1567; Hemingway’s 1917, § 1329; Laws, 1930, § 1355; Laws, 1942, § 2602.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-25-13. Proceedings certified to circuit court.

“The State of Mississippi

v.

Charged with murder.

John Jones.

“The said accused having been brought before the undersigned, a justice of the peace of \_\_\_\_\_ County, for examination of said charge, and I, the undersigned justice of the peace, having heard the testimony of the following witnesses touching said charge, viz.: \_\_\_\_\_ found the said accused should be held to await the action of the grand jury.

“And said John Jones was committed to jail without bail (or was required to give bail, with sureties, in the sum of two thousand five hundred dollars for

his appearance before the circuit court of said county to answer the charge of manslaughter, and, having given bail as required, was discharged accordingly).

“State of Mississippi, \_\_\_\_\_ County.

“I, Andrew Sims, a justice of the peace of said county, certify that the foregoing pages correctly represent the proceedings had and taken before me, on the \_\_\_\_\_ day of July, 1906, in the matter therein stated.

“Andrew Sims, J.P.”

**SOURCES:** Codes, 1892, § 1496; Laws, 1906, § 1568; Hemingway's 1917, § 1330; Laws, 1930, § 1356; Laws, 1942, § 2603.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

## § 99-25-15. Affidavit to obtain search warrant.

“State of Mississippi, \_\_\_\_\_ County.

“Before me, Andrew Sims, a justice of the peace of said county, Edward Nolly makes oath that, on or about the \_\_\_\_\_ day of \_\_\_\_\_ 1906, in the said county, a box of candles and a case of brogan shoes, the property of affiant, of the value of one hundred dollars were feloniously stolen, taken, or carried away; and affiant suspects Samuel Miller as the person guilty of said crime, and has reason to believe and does believe that the said stolen articles, or some of them, are now concealed in or about the dwelling house, or outhouses connected therewith, of the said Samuel Miller, in said county; and affiant prays a search warrant to search said premises, and seize the said goods if found, and also the body of said Samuel Miller, to be disposed of according to law.

“Edward Nolly.

“Sworn to and subscribed before me, the \_\_\_\_\_ day of \_\_\_\_\_, 1906.

“Andrew Sims, J.P.”

**SOURCES:** Codes, 1892, § 1497; Laws, 1906, § 1569; Hemingway's 1917, § 1331; Laws, 1930, § 1357; Laws, 1942, § 2604.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

Liability for costs of search warrant in certain criminal prosecutions, see § 99-1-11.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Sufficiency of affidavit.
3. —Statement of belief.
4. Defective affidavit.

**1. In general.**

There was sufficient information that would justify issuance of a search warrant against defendant; defendant's girlfriend had been the judge's ex-girlfriend, but the trial judge testified that he was the only judge who could issue the warrant, and a detached and neutral judge found sufficient foundation to have justified issuance of the warrant. *Cole v. State*, 915 So. 2d 481 (Miss. Ct. App. 2005).

The highway patrol had no authority to deliver a stolen pickup truck, which had an altered vehicle identification number and had been seized from an innocent purchaser pursuant to a valid search warrant, to an insurance company, which had paid the owner the full value of the truck under a theft loss insurance policy and was therefore the lawful owner of the vehicle, absent court approval with no advance notice to the innocent purchaser of its intent to do so and without giving him an opportunity to contest the matter in a court of competent jurisdiction; the appropriate procedure would have been for the highway patrol, once the truck served no further purpose in the criminal investigation or prosecution, to make a motion in the justice court for authority to release it to the insurance company, and to give the innocent purchaser and the insurance company reasonable notice of such application and an opportunity to be heard; however, the circuit court erred in directing return of the pickup truck to the innocent purchaser without making the insurance company a party to the hearing or giving it any notice of the proceeding, as this was a blatant violation of the insurance company's right to due process. *Weaver v. State*, 597 So. 2d 609 (Miss. 1992).

Property seized under a search warrant is an exercise of the police power of the State, and the State has the authority to keep and maintain control of the property until it is no longer needed in a criminal

prosecution or investigation; while the property is thus seized, it is under the lawful custody of the magistrate who issued the warrant or the court having jurisdiction of the criminal prosecution in which the property is material evidence; when seized property is no longer needed for criminal prosecution by the State, it should be restored to its lawful owner, and if there is no conflict as to ownership, the court having custody of the property ordinarily directs its release to the owner; although stolen property may have been seized by an invalid search warrant, this does not entitle a thief or the person claiming title through the thief to its return; if there is a dispute as to ownership of allegedly stolen property, it is resolved through a civil proceeding in which the State has no interest, and the property is held until the question of ownership has been determined by a civil action in a court of competent jurisdiction. *Weaver v. State*, 597 So. 2d 609 (Miss. 1992).

Application for search warrant, whether under Code 1942, § 2614, or this section [Code 1942, § 2604], is not also an application for appointment of special officer to serve it under Code 1942, § 1877, since sections dealing with search warrants make no provision for prayer for appointment of special officer to serve same, all such process being directed to be addressed to lawful officer. *Claunch v. State*, 208 Miss. 767, 45 So. 2d 581 (1950).

**2. Sufficiency of affidavit.**

An affidavit for a search warrant was not fatally defective merely because the attached page containing a description of the residence to be searched was not signed by the affiants, where other pages of the affidavit were signed, and the narcotics agent who was the author of the warrant and application swore that the description was not substituted. *Williams v. State*, 583 So. 2d 620 (Miss. 1991).

Detailed underlying facts supporting the affidavits for 2 search warrants furnished the judge with probable cause for issuing the search warrants, even though the criminal investigator who executed the affidavits erred in some of the state-



ments set forth in the underlying facts, where the investigator was cross-examined at the suppression hearing at great length by the defendant's attorney, there was no showing that the investigator intentionally misrepresented those facts or made them in reckless disregard for the truth, and the remaining underlying facts clearly constituted probable cause for the issuance of the search warrants. *Bevill v. State*, 556 So. 2d 699 (Miss. 1990).

In determining whether probable cause existed for a particular search or search warrant, judges must scrupulously examine the facts in each case, make a careful evaluation, and make a determination in their own best judgment. Probable cause is not what some officer thought, and not some conduct that was simply unusual or that simply roused the suspicion that illegal activity could be afoot, when there was at the same time just as likely a possibility that nothing at all illegal was transpiring. Rather, it must be information reasonably leading an officer to believe that, then and there, contraband or evidence material to a criminal investigation would be found. *Rooks v. State*, 529 So. 2d 546 (Miss. 1988).

An affidavit and search warrant to recover stolen goods is not invalid for failure to state name of owner of goods. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

Any description of places and things in the affidavit and search warrant which will enable the officer making the search to locate them with reasonable certainty is sufficient. *Mason v. State*, 32 So. 2d 140 (Miss. 1947).

### 3. —Statement of belief.

An affidavit which merely states that affiant suspects a person named to be guilty of receiving stolen goods, and fails to allege that affiant "has reason to believe, and does believe" that the stolen articles, or some of them, are concealed on such person's premises, is an insufficient basis for a warrant to search such premises. *Spann v. State*, 235 Miss. 270, 108 So. 2d 887 (1959).

A search of the premises of one accused of murder was illegal where both the affidavit and the search warrant used the word "suspects" instead of the language of the statute "has reason to believe, and

does believe." *Lancaster v. State*, 188 Miss. 374, 195 So. 320 (1940).

Under statute setting forth form of search warrant for stolen property, there must be an allegation both that the affiant has reason to believe and that he does believe that such stolen articles are concealed on premises, to constitute probable cause required for search of a person's premises for stolen goods, and mere suspicion however strong is not sufficient. *Jones v. State*, 180 Miss. 210, 177 So. 35 (1937).

Under statute providing for issuance of search warrant where person has reason to believe and does believe that stolen articles are concealed on person's premises, information upon which he has reason to believe and does believe must be such as would lead a reasonably prudent person to believe facts which, if established, would be sufficient to amount to a probability. *Jones v. State*, 180 Miss. 210, 177 So. 35 (1937).

An affidavit for search warrant, stating that affiant had suspicion that stolen hog was concealed on premises of accused and omitting words "and affiant has reason to believe, and does believe" that stolen hog was on premises of accused, was insufficient to support valid search warrant. *Jones v. State*, 180 Miss. 210, 177 So. 35 (1937).

Affidavit for search warrant, stating that affiant had suspicion that stolen goods were concealed on premises of accused, instead of stating in statutory words that affiant "has reason to believe and does believe" that stolen goods were on premises of accused, was insufficient to support valid search warrant, since under constitution suspicion is not sufficient foundation for issuance of search warrant. *Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

### 4. Defective affidavit.

Miss. Code Ann. § 41-29-157(a)(2) requires the affiant's and the affidavit's presence before the issuing magistrate before a search warrant may properly issue and under Miss. Code Ann. § 99-25-15, the form of an affidavit for a search warrant indicates the presence of the affiant at issuance; thus, the telephonic search warrant was invalid and the

search of defendant's apartment was a warrantless search. *White v. State*, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002).

In prosecution for theft of a hog, where search warrant was void as being issued upon affidavit failing to state that complaining witness had reason to believe and did believe that stolen hog was concealed on premises of accused and was based only upon suspicion, admission in evidence of search warrant and evidence of officers acting under it was reversible error. *Jones v. State*, 180 Miss. 210, 177 So. 35 (1937).

Where the sheriff's search was illegal because of a defect in the affidavit and search warrant, his testimony was inadmissible in a murder prosecution.

*Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

Testimony of state's witness that he saw the sheriff make a search of defendant's premises and the finding of the murder weapon, was inadmissible where the search made by the sheriff was illegal for defect in the affidavit and search warrant. *Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

Testimony of state's witness that from her home, a short distance from that of defendant, she saw the search made by the sheriff and the murder weapon found, was inadmissible where the search made by the sheriff was illegal for defect. *Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

## RESEARCH REFERENCES

**ALR.** Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed. 14 A.L.R.2d 605.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 A.L.R.4th 1266.

Seizure of books, documents, or other papers under search warrant not describing such items. 54 A.L.R.4th 391.

Propriety of execution of search warrant at nighttime. 41 A.L.R.5th 171.

**Am Jur.** 68 Am. Jur. 2d, Searches and Seizures §§ 169, 173-175.

22 Am. Jur. Pl & Pr Forms (Rev), Searches and Seizures, Form 3 (affidavit for search warrant).

5 Am. Jur. Trials, Excluding Illegally Obtained Evidence §§ 1 et seq.

**CJS.** 79 C.J.S., Searches and Seizures §§ 51, 128 et seq., 148 et seq.

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

## § 99-25-17. Search warrant and capias.

"The State of Mississippi.

"To any lawful officer of \_\_\_\_\_ County:

"Oath having been made before the undersigned, a justice of the peace of said county, that a box of candles and a case of brogan shoes, the property of Edward Nolly, on or about the \_\_\_\_\_ day of \_\_\_\_\_ 1906, in said county, were feloniously taken, stolen, and carried away and that suspicion rests on Samuel Miller as guilty of said crime, and affiant has reason to believe and does believe that the said stolen articles, or some of them, are concealed in or about the dwelling house, or outhouses connected therewith, of the said Samuel Miller, in said county:

"We command you, with the necessary assistance, to enter into the said dwelling house of Samuel Miller, and the outhouses connected therewith, and there diligently search for the said goods and chattels; and if the same, or any

part thereof, be found, that you bring them, and also the body of said Samuel Miller, forthwith before the undersigned, or some other justice of the peace, to be disposed of according to law.

"Witness my hand, the \_\_\_\_\_ day of \_\_\_\_\_, 1906.

"Andrew Sims, J.P."

A search warrant may be only to search for stolen goods, and omit the command to arrest the person.

**SOURCES:** Codes, 1892, § 1498; Laws, 1906, § 1570; Hemingway's 1917, § 1332; Laws, 1930, § 1358; Laws, 1942, § 2605.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Sufficiency of warrant.
3. Defective warrant.

#### 1. In general.

The evidence was sufficient to support a finding that a circuit court judge who issued a search warrant was neutral and detached, in spite of the defendant's argument that the judge was not neutral as he was the son of a welfare department employee who was present during the issuance of the warrant, where the judge stated that he relied upon what the officers told him and what the affidavit contained; the fact that the judge was at the home of his mother, who worked for the welfare department, when the warrant was issued, did not taint his neutrality. *Ormond v. State*, 599 So. 2d 951 (Miss. 1992).

The highway patrol had no authority to deliver a stolen pickup truck, which had an altered vehicle identification number and had been seized from an innocent purchaser pursuant to a valid search warrant, to an insurance company, which had paid the owner the full value of the truck under a theft loss insurance policy and was therefore the lawful owner of the vehicle, absent court approval with no advance notice to the innocent purchaser of its intent to do so and without giving him an opportunity contest the matter in a court of competent jurisdiction; the ap-

propriate procedure would have been for the highway patrol, once the truck served no further purpose in the criminal investigation or prosecution, to make a motion in the justice court for authority to release it to the insurance company, and to give the innocent purchaser and the insurance company reasonable notice of such application and an opportunity to be heard; however, the circuit court erred in directing return of the pickup truck to the innocent purchaser without making the insurance company a party to the hearing or giving it any notice of the proceeding, as this was a blatant violation of the insurance company's right to due process. *Weaver v. State*, 597 So. 2d 609 (Miss. 1992).

Property seized under a search warrant is an exercise of the police power of the State, and the State has the authority to keep and maintain control of the property until it is no longer needed in a criminal prosecution or investigation; while the property is thus seized, it is under the lawful custody of the magistrate who issued the warrant or the court having jurisdiction of the criminal prosecution in which the property is material evidence; when seized property is no longer needed for criminal prosecution by the State, it should be restored to its lawful owner, and if there is no conflict as to ownership, the court having custody of the property ordi-



narily directs its release to the owner; although stolen property may have been seized by an invalid search warrant, this does not entitle a thief or the person claiming title through the thief to its return; if there is a dispute as to ownership of allegedly stolen property, it is resolved through a civil proceeding in which the State has no interest, and the property is held until the question of ownership has been determined by a civil action in a court of competent jurisdiction. *Weaver v. State*, 597 So. 2d 609 (Miss. 1992).

Probable cause existed for the issuance of a search warrant for a defendant's residence, in spite of the defendants' argument that an informant's personal observation of marijuana at the residence 2 weeks earlier was stale and too remote, where 2 narcotics agents saw a sale of marijuana, which came from one of the defendants and from the house in question on the day of the search. *Williams v. State*, 583 So. 2d 620 (Miss. 1991).

There was no merit to a defendant's claim that the judge who issued 2 search warrants was not neutral and detached on the basis that the judge who went to the scene of the crime and saw the body also issued the search warrants, where there was no showing as to how this, in and of itself, created any prejudice or bias towards the defendant. *Bevill v. State*, 556 So. 2d 699 (Miss. 1990).

The search of a one-story building, pursuant to an affidavit and search warrant for a 2-story dwelling, did not violate the defendant's constitutional rights where the officer who made the affidavit for the search warrant had driven by the defendant's property in a rural area and thought that there was only one building—the 2-story building—on the property, the defendant owned all the property but resided in the one-story building, the officers went to the unoccupied 2-story building when they arrived on the property but received no answer, the defendant came to the front door of the one-story building and the officers went there and served him with the warrant, and the officers searched the one-story building and found marijuana in that building. The affidavit and search warrant sufficiently directed the officers to the defendant's premises

where they found him in his residence, executed the warrant and discovered marijuana, and therefore the trial court was not in error when it denied the defendant's motion to suppress the evidence found in the search. *White v. White*, 556 So. 2d 685 (Miss. 1989).

A storm shed was within the "curtilage" of a residence and, therefore, within the scope of a search warrant that permitted a search of the residence, where the shed was approximately 150 to 175 feet from the house, the shed was the type of building used in connection with a residence, there were only a few trees separating the house and shed, and, most importantly, the house and shed were on the same side of the fence and not separated by it. *Arnett v. State*, 532 So. 2d 1003 (Miss. 1988).

A search conducted at 11:30 p.m. exceeded the officer's authority under the search warrant where the warrant authorized searches only "in the daytime"; thus, the fruits of the search were inadmissible at trial. *Strange v. State*, 530 So. 2d 1336 (Miss. 1988).

A judge who issues a search warrant is not required to confer on the searching officer the full range of authority allowed by law. The judge is within his prerogatives to limit the officer's authority, either by use of a pre-printed form or by interlined language. *Strange v. State*, 530 So. 2d 1336 (Miss. 1988).

Application for search warrant, whether under Code 1942, §§ 2604, 2614, is not also an application for appointment of special officer to serve it under Code 1942, § 1877, since sections dealing with search warrants make no provision for prayer for appointment of special officer to serve same, all such process being directed to be addressed to lawful officer. *Claunch v. State*, 208 Miss. 767, 45 So. 2d 581 (1950).

## 2. Sufficiency of warrant.

A search warrant was not defective because it erroneously named the defendant as the owner of the property to be searched. The Fourth Amendment does not require that either the affidavit or the warrant give the name of the owner of the property to be searched; identifying the owner of the premises is relevant only to

assist and aid in particularizing the place to be searched. *Williams v. State*, 583 So. 2d 620 (Miss. 1991).

An affidavit and search warrant to recover stolen goods is not invalid for failure to state name of owner of goods. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

Any description of places and things in the affidavit and search warrant which will enable the officer making the search to locate them with reasonable certainty is sufficient. *Mason v. State*, 32 So. 2d 140 (Miss. 1947).

A search warrant which bore the only date "this the 12th day of Johnson, 194-" was void and not amendable on the trial by the court's permission. *Johnson v. State*, 202 Miss. 233, 31 So. 2d 127 (1947).

### 3. Defective warrant.

Evidence obtained by means of an improperly issued search warrant is inad-

missible. *Spann v. State*, 235 Miss. 270, 108 So. 2d 887 (1959).

Where the sheriff's search was illegal because of a defect in the affidavit and search warrant, his testimony was inadmissible in a murder prosecution. *Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

Testimony of state's witness that he saw the sheriff make a search of defendant's premises and the finding of the murder weapon, was inadmissible where the search made by the sheriff was illegal for defect in the affidavit and search warrant. *Bouchillon v. State*, 179 Miss. 791, 177 So. 34 (1937).

## RESEARCH REFERENCES

**ALR.** Sufficiency of description in search warrant of automobile or other conveyance to be searched. 47 A.L.R.2d 1444.

Seizure of books, documents, or other papers under search warrant not describing such items. 54 A.L.R.4th 391.

Propriety of execution of search warrant at nighttime. 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched. 43 A.L.R.5th 1.

Admissibility of evidence obtained during nighttime search by federal officers where warrant does not contain "appropriate provision" authorizing execution at times other than daytime as required by

Rule 41(c) of Federal Rules of Criminal Procedure. 58 A.L.R. Fed. 757.

**Am Jur.** 68 Am. Jur. 2d, Searches and Seizures §§ 173, 174.

22 Am. Jur. Pl & Pr Forms (Rev), Searches and Seizures, Form 31 (search warrant).

5 Am. Jur. Trials, Excluding Illegally Obtained Evidence §§ 1 et seq.

**CJS.** 79 C.J.S., Searches and Seizures §§ 128 et seq.

**Practice References.** Adams and Blinka, *Prosecutor's Manual for Arrest, Search and Seizure* (Michie).

John Wesley Hall, *Search and Seizure*, Third Edition (Michie).

## CHAPTER 27

### Proceedings for Intoxicating Beverage Offenses

#### SEC.

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#### **§ 99-27-1. Petition to subpoena witnesses having knowledge of violations.**

When any officer or five or more reputable citizens of any county shall file a petition with any mayor or justice of the peace of any county stating that they have reason to believe, and do believe, that a certain person or persons have knowledge touching a violation of the criminal law against the sale, barter, or possession of intoxicating liquors, or the unlawful keeping of the same, and who shall deposit sufficient money to cover the estimated cost of the proceedings or give bond to secure the same, such mayor or justice of the peace shall forthwith issue a subpoena returnable instant, or on a day certain not later than five days, for such witnesses as may be named in said petition to appear before him at the time and place specified to answer all questions which may be propounded to him. If any witness who has been summoned shall fail to appear and testify, the mayor or justice of the peace may issue an attachment returnable before him at such time and place as he may designate, and said mayor or justice of the peace shall have full power to fine and imprison for



contempt any witness failing to appear or refusing to testify, as well as for any other contempt.

**SOURCES:** Codes, 1906, § 1752; Hemingway's 1917, § 2091; Laws, 1930, § 1981; Laws, 1942, § 2620; Laws, 1900, ch. 106.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Alcoholic beverage regulations generally, see §§ 67-1-1 et seq. and 67-3-1 et seq.

Intoxicating beverage offenses, see §§ 97-31-5 et seq.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### RESEARCH REFERENCES

**CJS.** 48 C.J.S., Intoxicating Liquors  
§§ 282, 285, 286, 288, 290, 291.

### § 99-27-3. Taking testimony and filing for delivery to grand jury.

When said mayor or justice shall be ready to take the testimony of a witness or witnesses so summoned he may do so on private examination or in public, or he may admit such persons as he may deem advisable, but all the testimony so taken shall be in writing and subscribed to under oath administered by said justice, and any witness swearing falsely shall be guilty of and punished for perjury. The testimony so taken shall be filed with the circuit clerk of the county on or before the first day of the circuit court thereafter, and by such clerk delivered to the foreman of the grand jury.

**SOURCES:** Codes, 1906, § 1753; Hemingway's 1917, § 2092; Laws, 1930, § 1982; Laws, 1942, § 2621.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-27-5. Grand jury not prevented from making investigation.

The taking of such testimony by such mayor or justice shall not prevent the grand jury from making a thorough investigation of any matter inquired into before such justice of the peace, nor shall the same in any way bar any criminal prosecution not finally disposed of and punished by such justice of the peace.

**SOURCES:** Codes, 1906, § 1754; Hemingway's 1917, § 2093; Laws, 1930, § 1983; Laws, 1942, § 2622.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-27-7. Duty of mayor or justice of the peace to issue warrant for offender.

If, on investigation before such mayor or justice of the peace, it shall appear that any person has violated the law against unlawful retailing or giving away of intoxicating liquors, or that any person is unlawfully keeping intoxicating liquors, it shall be the duty of such mayor or justice of the peace, upon affidavit being made, to issue his warrant for the person or persons supposed to be guilty and dispose of the same as other criminal prosecutions before a mayor or justice of the peace under the laws of the state.

**SOURCES:** Codes, 1906, § 1755; Hemingway's 1917, § 2094; Laws, 1930, § 1984; Laws, 1942, § 2623.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Intoxicating beverage offenses, see § 97-31-5 et seq.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### § 99-27-9. Statement not limited to proof of single violation at trial.

On the trial of all prosecutions for the violation of law by the sale or giving away of liquors, bitters, or drinks, the state shall not be confined to the proof of a single violation, but may give evidence in any one or more offenses of the same character committed anterior to the day laid in the indictment or in the affidavit, and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment or in the affidavit.

**SOURCES:** Codes, 1892, § 1596; Laws, 1906, § 1762; Hemingway's 1917, § 2098; Laws, 1930, § 1986; Laws, 1942, § 2625.

**Cross References** — Alcoholic beverage regulations generally, see §§ 67-1-1 et seq. and 67-3-1 et seq.

Intoxicating beverage offenses, see §§ 97-31-5 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Date of sale.
3. Other sales.
4. Former jeopardy.

### 1. In general.

Admission of evidence of more than one distinct offense in liquor prosecution cannot be complained of for first time in

supreme court. *Bumpus v. State*, 166 Miss. 276, 144 So. 897 (1932).

Law authorizing state in liquor prosecution to give evidence of offenses committed before date alleged in indictment held constitutional. *Buford v. State*, 146 Miss. 66, 111 So. 850 (1927).

Proof of possession of liquor, subsequent to date charged in indictment for possession, held competent. *Smith v. State*, 144 Miss. 872, 110 So. 690 (1926).

This section [Code 1942, § 2625] not applicable to the mere keeping of liquor in violation of law. *Lowe v. State*, 127 Miss. 340, 90 So. 78 (1921).

This section [Code 1942, § 2625] does not apply where one is charged with acting as the agent of the buyer of liquor. *Page v. State*, 105 Miss. 536, 62 So. 360 (1913).

Evidence that defendant had been previously convicted before justice of peace of an offense of the same character, not authorized by this section [Code 1942, § 2625]. *Webster v. State*, 103 Miss. 259, 60 So. 214 (1912).

State cannot prove more than one sale and then elect one on which it will ask conviction. *King v. State*, 99 Miss. 23, 54 So. 657 (1910).

This section [Code 1942, § 2625] applies to prosecutions for violation of city ordinance. *Thomas v. Yazoo City*, 95 Miss. 395, 48 So. 821 (1909).

Error to charge jury to convict if they believe either of the sales has been proven. *Thomas v. Yazoo City*, 95 Miss. 395, 48 So. 821 (1909).

Defendant entitled to demand that state elect a particular sale on which it relied under indictment based solely on the ground of unlawful sale without a license. *Kittrell v. State*, 89 Miss. 666, 42 So. 609 (1907).

## 2. Date of sale.

Under this section [Code 1942, § 2625] the date of the offense charged must be specifically laid. *Cage v. State*, 105 Miss. 326, 62 So. 358 (1913).

## 3. Other sales.

Indictment charging unlawful sale of intoxicating liquor which alleged that sale was made on \_\_\_\_\_ day of July held insufficient to allow proof of more

than one sale, since indictment must be specific and precise as to date of sale for which prosecution is being conducted, where state seeks to prove more than one sale. *Walker v. State*, 177 Miss. 807, 172 So. 138 (1937).

Evidence of two distinct sales of liquor held inadmissible, where affidavit charged sale on or about specified date. *Robins v. State*, 151 Miss. 529, 118 So. 535 (1928).

Evidence of sales of intoxicating liquors subsequent to date alleged in affidavit or indictment is not admissible. *Horton v. State*, 147 Miss. 37, 112 So. 591 (1927).

Evidence of more than one distinct sale of liquor is inadmissible where date of offense is not specifically laid by indictment. *Voss v. State*, 144 Miss. 825, 110 So. 670 (1926); *Winningham v. State*, 156 Miss. 659, 126 So. 477 (1930).

After state introduces evidence of one offense of manufacturing liquor, introducing evidence of other offenses is error, notwithstanding statute. *Parkinson v. State*, 145 Miss. 237, 110 So. 513 (1926).

Under affidavit charging sale of intoxicating liquor on given date, erroneous to admit evidence of more than one sale. *Bailey v. State*, 144 Miss. 467, 110 So. 230 (1926).

To permit evidence of more than one offense occurring anterior to date laid in indictment to be given, date must be specifically laid therein. *Prine v. State*, 141 Miss. 667, 107 So. 280 (1926).

Admitting evidence of more than one sale, unless made prior to date alleged, held error; if evidence makes it uncertain whether sale proved may have occurred subsequent to date alleged, conviction will be reversed. *Maxey v. State*, 140 Miss. 570, 106 So. 353 (1925).

State cannot introduce evidence of sale of which another court of concurrent jurisdiction has exclusive jurisdiction. *Hampton v. State*, 138 Miss. 196, 103 So. 10 (1924).

This section [Code 1942, § 2625] does not apply where evidence of only one sale was offered, and in such case evidence of sale made after date laid in indictment warrants conviction. *Oliver v. State*, 101 Miss. 382, 58 So. 6 (1912).

Error to admit proof of sales after day fixed, though before indictment returned.



Moses v. State, 100 Miss. 346, 56 So. 457 (1911).

Other sales may be shown to have taken place within the period of limitation, and must be proved with same certainty as that relied on for conviction. Harvey v. State, 95 Miss. 601, 49 So. 268 (1909).

#### 4. Former jeopardy.

Former jeopardy to be available must be pleaded; supreme court will not look to another record for former acquittal or conviction; or go outside of record to ascertain facts. Bufkin v. State, 134 Miss. 116, 98 So. 455 (1923).

Where proof showed offense was committed prior to September 25, plea of

former acquittal supported by proof of acquittal on same charge on September 25 at which trial state offered evidence of sales prior thereto, must be sustained. Williams v. State, 102 Miss. 274, 59 So. 87 (1912).

While indictment was pending in circuit court, no other prosecution for the same character of offense committed within two years prior to indictment could be commenced. Neely v. State, 100 Miss. 211, 56 So. 377 (1911).

Plea of former conviction under indictment which left blank date of similar offense, held good against demurrer. Wadley v. State, 96 Miss. 77, 50 So. 494 (1909).

### RESEARCH REFERENCES

**ALR.** Admissibility, in prosecution for illegal sale of intoxicating liquor, other sales. 40 A.L.R.2d 817.

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 330 et seq.

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 475, 476-482.

## § 99-27-11. Seizure and destruction of intoxicating liquors and appliances permitted; writ of seizure for vehicles, etc.

No property rights shall exist in any person, natural or artificial, or be vested in them in any intoxicating liquors or intoxicating drinks prohibited by Chapter 31 of Title 97, Mississippi Code of 1972 or this chapter from being manufactured, or distilled, or sold, or possessed, nor shall any property rights exist in such persons of stills, fixtures, furniture, vehicles, automobiles or other motor-power means of transportation, or in boats, ships, or other water craft, or air-craft or any other articles, when such articles are being kept or used, directly or indirectly, as means and appliances to violate the provisions of said chapters, and all such things may be seized by any sheriff, or other lawful officer of this state and destroyed and rendered useless without any formal order of the court, and may be searched for and seized under the laws of this state. But all vehicles, conveyances, or other means of transportation above described, kept and used in handling of liquor or otherwise violating the provisions of said chapters may be first seized by such sheriff, or other lawful officer, who shall immediately make complaint under oath before the proper officer, or court, stating the facts connected with said seizure by him, giving the name or names of the person or persons found in possession or control of each article taken that was being used in transportation as well as the intoxicating liquors, or drinks and appliances or other articles seized and taken by him, and also giving the name of the owner of each article, if the same is known to him. Whereupon the said officer or court shall summon into his court all interested parties and may issue a writ of seizure, if said property, or any part of it is not

in the possession of said officer, for the seizure of any of said property and the summoning of the interested parties into court, as in proceedings for the enforcement of purchase price liens against property.

**SOURCES:** Codes, Hemingway's 1921 Supp. § 2163e; Laws, 1930, § 1979; Laws, 1942, § 2618; Laws, 1918, ch 189.

**Editor's Note** — Sections 97-31-1 and 97-31-3, referred to in this section, were repealed by Laws of 1988, ch. 562, § 3, effective from and after July 1, 1988.

Section 97-31-13, referred to in this section, was repealed by Laws of 1980, ch. 453, effective from and after passage (approved May 1, 1980).

**Cross References** — Unlawful possession of alcoholic beverages or personal property used to violate alcoholic beverages control laws and sale thereof following seizure, see § 67-1-17.

Remedy to enforce lien, see § 85-7-31.

Owner may interpose claim to seized property, see § 99-27-13.

## JUDICIAL DECISIONS

1. In general.
2. Search and seizure.
3. Condemnation and forfeiture.

### 1. In general.

Section 67-1-17, providing for the seizure of unlawful alcoholic beverages, violates federal due process requirements by failing to provide for reasonable notice to the owner of a seized vehicle prior to its forfeiture. However, notice to the owner of a seized vehicle advising him of the pendency of a subsequent forfeiture proceeding, provided by this section, and the owner's opportunity to interpose a claim to the seized property prior to its forfeiture, provided by § 99-27-13, satisfy due process notice and hearing requirements. *Holladay v. Roberts*, 425 F. Supp. 61 (N.D. Miss. 1977).

Where property misappropriated by dishonest employees consisted of quantity of intoxicating liquors belonging to their employer engaged in an illegal business, the employer cannot recover for his loss under a blanket fidelity bond. *Smith v. Maryland Cas. Co.*, 252 Miss. 81, 172 So. 2d 574 (1965).

Despite the fact that the issuer of a blanket fidelity bond contracted that it would not defend any claim on the ground that the insured employer was engaged in an illegal business, no recovery was permitted for the misappropriation by dishonest employees of a quantity of intoxicating

liquors, the possession of which was statutorily illegal. *Smith v. Maryland Cas. Co.*, 252 Miss. 81, 172 So. 2d 574 (1965).

This provision does not abridge the right to cause arrest of persons who willfully damage such property. *Lenaz v. Conway*, 234 Miss. 231, 105 So. 2d 762 (1958).

This statute is highly penal and is to be strictly construed against the state. *Brooks v. Wynn*, 209 Miss. 156, 46 So. 2d 97 (1950).

Purpose of this statute is to disqualify any persons, unlawfully in possession of liquor or motor vehicles used in connection therewith, from asserting right to their recovery, or for damages for their seizure, and its purpose is not to abridge state of its power to punish persons who steal liquor, or rob persons and take their liquor. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Statute held not to repeal laws prohibiting sale of liquor. *Buford v. State*, 146 Miss. 66, 111 So. 850 (1927).

Action is maintainable against hotel for loss of suitcase containing intoxicating liquor. *Edwards House v. Davis*, 124 Miss. 485, 86 So. 849 (1921).

### 2. Search and seizure.

Search and seizure of a motor vehicle may be made without a warrant if the information upon which the seizing officer acts is given him by a credible person.

State, ex rel. Kemper County v. Brown, 219 Miss. 383, 68 So. 2d 419 (1953).

Order of sale of defendant's automobile was invalid where proceedings therefore were based upon search of such automobile while it was parked near defendant's premises and seizure of a quantity of whisky found therein, without any warrant to search such automobile and without evidence or information that the automobile was being used in the actual transportation of liquor, it appearing that the search and seizure took place after a search of defendant's premises under a warrant authorizing a search for stolen property. *Brooks v. Wynn*, 209 Miss. 156, 46 So. 2d 97 (1950).

An officer may seize an automobile used in the transportation of intoxicating liquors in violation of law without previously obtaining a writ of seizure. *Owens v. Reese*, 203 Miss. 322, 33 So. 2d 834 (1948).

A writ of prohibition will not lie to prevent a sheriff who has seized an automobile without obtaining in advance a writ of seizure and other officials from taking further steps in a case pending for condemnation and sale of the automobile. *Owens v. Reese*, 203 Miss. 322, 33 So. 2d 834 (1948).

### 3. Condemnation and forfeiture.

In an action to condemn and sell an automobile which had been seized while in possession of a third person, who had

allegedly used it for transporting intoxicating liquor, the owner, in interposing his claim, was entitled to give a forthcoming bond and gain possession thereof pending a hearing, both in the circuit court and on appeal, as to his ownership thereof, and as to whether he had knowingly permitted it to be used for unlawful purposes in violation of this section [Code 1942, § 2618] and Code 1942, § 2619. *Stringer v. State*, 229 Miss. 412, 91 So. 2d 263 (1956).

Under this section [Code 1942, § 2618], and Code 1930, § 2007 [Code 1942, § 2646], and under Laws of 1938, Chap. 341 [Code 1942, § 1073], proceedings to abate nuisances of selling intoxicating liquors and carrying on gambling on the premises described, and a decree enjoining the defendant from operating such nuisances on such premises, and providing for the condemnation and sale of all personal property used in connection therewith were proper and warranted. *Caravella v. State ex rel. Holcomb*, 185 Miss. 1, 186 So. 653 (1939).

Statute held not to authorize confiscation or forfeiture of vehicles used in attempt to manufacture. *Powell v. State*, 137 Miss. 464, 102 So. 540 (1925).

Statute held not to authorize seizure and sale of vehicles transporting still and appliances for making intoxicating liquors. *Powell v. State*, 137 Miss. 464, 102 So. 540 (1925).

## RESEARCH REFERENCES

**ALR.** Forfeiture of property for unlawful use before trial of individual offender. 3 A.L.R.2d 738.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child—state cases. 51 A.L.R.5th 425.

What circumstances fall within "inevi-

table discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 A.L.R. Fed. 331.

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 428 et seq.

14A Am. Jur. Pl & Pr Forms (Rev), Intoxicating Liquors, Form 145 (judgment or decree of forfeiture of illicit liquor).

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 692 et seq.

## § 99-27-13. Owner may interpose claim to seized property; jurisdiction and procedure.

If any person claims the intoxicating liquors seized on any of the



appliances either for handling, making, possessing, or transporting which have been seized, he may put in his claim therefor under oath stating in detail why said property, or any of it so seized, should not be destroyed, or sold for the benefit of the county, and said affidavit shall state the market value of the property so claimed by him, which amount as so fixed shall determine the jurisdiction of the court as to the amount involved or the value of the property. If the affidavit fixes the value of the property at \$200.00 or less and the proceeding is returnable before a justice of the peace otherwise having jurisdiction, the said justice of the peace shall finally dispose of the issue in the case joined under his direction. But if the affidavit fixes the value of the property at more than \$200.00 the justice of the peace before whom the case is returnable shall forthwith transfer said cause to the circuit court of the county having jurisdiction to try the case, where the issues shall, under the direction of the circuit court, be joined between the State of Mississippi and the said claimant, and the case there tried as other cases. But if the affidavit of the officer in the first instance shows that the value of the property does not exceed \$200.00 and no claim is interposed by the parties in interest, on or before the return day of the summons and writ of seizure, the justice of the peace on the return day shall hear and dispose of the property, and may order all liquors, stills or integral parts thereof and all other unlawful articles to be destroyed, and may condemn all vehicles of transportation to be sold and the proceeds, after deducting the costs, paid into the county treasury to the credit of the general county fund. In the event the property is claimed by parties interested and issues joined in any court having jurisdiction of the case, such court trying the case shall have the rights of the state and the claimant determined in a trial according to the rules of procedure in such court, and if it be determined that any property involved in such trial was kept, possessed, manufactured, or used in violation of any provision of Chapter 31 of Title 97, Mississippi Code of 1972 or this chapter it shall be ordered destroyed and rendered useless for unlawful use, but all vehicles, boats and other means of transportation used in transporting articles in violation of said chapters shall be condemned to be sold and the proceeds from such sale, after paying the costs of the courts, shall be placed in the county treasury to the credit of the general county fund.

But in all such trials and proceedings as provided for in this section the claimant may, before he shall file his claim, be required to execute a solvent bond in sufficient amount to cover all costs that may likely accrue, conditioned that he will pay all costs in the case that may be adjudged against him, and in the event the claimant fails to establish his claim, or any part of it to said articles, he may be taxed with all, or any part of the costs of the case, and judgment shall go against his sureties for all costs adjudged against him.

**SOURCES:** Codes, 1906, §§ 1750, 1751; Hemingway's 1917, §§ 2089, 2090; Laws, 1930, § 1980; Laws, 1942, § 2619.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Sections 97-31-1 and 97-31-3, referred to in this section, were repealed by Laws of 1988, ch. 562, § 3, effective from and after July 1, 1988.

Section 97-31-13, referred to in this section, was repealed by Laws of 1980, ch. 453, effective from and after passage (approved May 1, 1980).

**Cross References** — Trial of right of property, see §§ 11-23-7 et seq.

Seizure, forfeiture, and disposal of property seized pursuant to violation for unlawful possession of alcoholic beverages, see §§ 67-1-17, 67-1-18.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Jurisdiction.
3. Owner's knowledge or consent.

### 1. In general.

Section 67-1-17, providing for the seizure of unlawful alcoholic beverages, violates federal due process requirements by failing to provide for reasonable notice to the owner of a seized vehicle prior to its forfeiture. However, notice to the owner of a seized vehicle advising him of the pendency of a subsequent forfeiture proceeding, provided by § 99-27-11, and the owner's opportunity to interpose a claim to the seized property prior to its forfeiture, provided by this section, satisfy due process notice and hearing requirements. *Holladay v. Roberts*, 425 F. Supp. 61 (N.D. Miss. 1977).

Evidence held to sustain finding that liquor was consigned to, and the property of, residents of Mississippi. *Hall v. State ex rel. Waller*, 247 Miss. 896, 157 So. 2d 781 (1963).

In an action to condemn and sell an automobile which had been seized while in possession of a third person, who had allegedly used it for transporting intoxicating liquor, the owner, in interposing his claim, was entitled to give a forthcoming bond and gain possession thereof pending a hearing, both in the circuit court and on appeal, as to his ownership thereof, and as to whether he had knowingly permitted it to be used for unlawful purposes in violation of Code 1942, § 2618 and this section [Code 1942, § 2619]. *Stringer v. State*, 229 Miss. 412, 91 So. 2d 263 (1956).

Where the owner of an automobile, under a conditional sales contract, moved the trial court to enter an order releasing to him the automobile, which had been seized by the sheriff after allegedly being

used by a third person to transport liquor, and filed a forthcoming bond, the mere fact that the bond was designated a "replevin bond" did not constitute the commencement of an action of replevin, so as to bar the owner under the principle that replevin does not allow for property in custodia legis. *Stringer v. State*, 229 Miss. 412, 91 So. 2d 263 (1956).

### 2. Jurisdiction.

Affidavit or declaration in proceeding to condemn property used in violation of prohibition laws must state value of property; justice of the peace has no power to condemn such property if value exceeds \$200; in proceeding before justice to condemn such property any person may raise question of jurisdiction on appeal to circuit court. *Vance v. State*, 130 Miss. 251, 93 So. 881 (1922).

### 3. Owner's knowledge or consent.

In an action to condemn and sell an automobile which had been seized while in possession of a third person, who had allegedly used it for the transportation of intoxicating liquors, while the state's proof that the third person had been seen driving the automobile from time to time for a period of three or four months was a circumstance for the consideration of the jury as to the owner's knowledge, it was not sufficient as a matter of law to charge the owner with knowledge that the third person was using the automobile for an unlawful purpose. *Stringer v. State*, 229 Miss. 412, 91 So. 2d 263 (1956).

In a proceeding to condemn and sell an automobile for illegal use in the transportation of whisky, in order to authorize the state to condemn the automobile, it was necessary to prove that the owner knowingly consented for the driver to transport whisky in the owner's automobile. *Lowery*



v. State, 219 Miss. 547, 69 So. 2d 213 (1954).

Where undisputed facts showed that neither taxicab owner nor chauffeur knew that passenger was using car to transport intoxicating liquors, and that the owner

had not been negligent in employing the chauffeur, and had directed him not to use the car for such illegal purposes, the circuit court could not order the car forfeited and destroyed. *Aldinger v. State*, 115 Miss. 314, 75 So. 441 (1917).

### RESEARCH REFERENCES

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 470 et seq.

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 692 et seq.

### § 99-27-15. Affidavit for search warrant; contents of warrant; service and return.

Upon the affidavit of any credible person that he has reason to believe and does believe: (1) That intoxicating liquor is being stored, kept, owned, controlled, or possessed, in violation of the laws of the state, at any designated place or within any designated receptacle, which place is to be stated in the affidavit; or (2) that intoxicating liquor is being sold or offered for sale contrary to law at any designated place; or (3) that liquor is being manufactured or distilled, or attempted to be manufactured or distilled at any designated place, in violation of the laws of the state; or (4) that intoxicating liquor is being transported, attempted to be transported within the state at or over or through any designated place, contrary to the laws of the state, it shall be the duty of any justice of the peace of the county or county judge, or the judge of the circuit court of the district or the chancellor of the district in which the place is situated, to issue a search warrant, directed to the sheriff or any constable of the county, or if in a municipality, to the sheriff or any constable or marshal or policeman therein, commanding him to proceed in the day or night time, to enter by breaking if necessary, and to diligently search any building, room in a building, outhouses, place, wagon, cart, buggy, automobile, motorcycle, motor truck, water or air craft or other vehicle, as may be designated in the affidavit, and to seize said intoxicating liquor, and any wagon, buggy, cart, automobile, motorcycle, motor truck, water or air craft or other vehicle used or attempted to be used in the transporting of the same, or any still or distillery or integral part of the same including appliances, vessels and equipment pertaining thereto used in making or manufacturing or attempting to make or manufacture said intoxicating liquor, and to hold the same until disposed of by law, and to arrest the person, or persons in possession and control of the same.

The writ shall be returnable instanter or on a day stated and a copy shall be served on the owner or person in possession if such person be present or readily found.

**SOURCES:** Codes, 1930, § 1975; Laws, 1942, § 2614; Laws, 1924, ch. 244.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.



**Cross References** — Seizure of alcoholic beverages and other related personal property subject to forfeiture for unlawful possession thereof, see §§ 67-1-17, 67-1-18.

Intoxicating beverage offenses, see §§ 97-31-5 et seq.

Arrests made without warrant, see § 99-3-7.

Form of affidavit for search warrant, see § 99-27-17.

Form of search warrant, see § 99-27-19.

Search of motor vehicles, etc. and seizures of liquor without warrant, see § 99-27-21.

## JUDICIAL DECISIONS

1. In general.
2. Affidavit, sufficiency.
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### 1. In general.

Search warrants are in the nature of criminal process and may be invoked only in furtherance of public prosecutions, and statute providing for their issuance and execution are sustained, under constitutional provisions forbidding unreasonable search and seizure, only as a necessary means in suppression of crime and detection and punishment of criminals. *Brooks v. Wynn*, 209 Miss. 156, 46 So. 2d 97 (1950).

Provisions for search and seizure are construed strictly against the state. *Adams v. State*, 202 Miss. 68, 30 So. 2d 593 (1947).

Issuance of search warrants in case involving possession of intoxicating liquors upon the statutory affidavit, that the affiant "has reason to believe and does believe," etc., does not violate Art. 3, § 23 of the state constitution. *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438 (1943).

A search warrant, issued in case involving possession of intoxicating liquors upon the statutory affidavit that the affiant "has reason to believe and does believe," was not invalid as a violation of the Fourth Amendment to the federal constitution, since such amendment applies only to the exercise of federal authority

and has no application to state action. *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438 (1943).

The fact that a search warrant is issued on Sunday does not render it invalid, where there is no express prohibition in that respect by statutory enactment. *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438 (1943).

This section [Code 1942, § 2614] is not unconstitutional. *Winters v. State*, 142 Miss. 71, 107 So. 281 (1926); *Loeb v. State*, 133 Miss. 883, 98 So. 449 (1923); *Bufkin v. State*, 134 Miss. 1, 98 So. 452 (1923).

Statutory provision that search warrant may issue upon affidavit of any credible person, that he has reason to believe, and does believe, certain facts, held not to violate constitution. *Winters v. State*, 142 Miss. 71, 107 So. 281 (1926).

Constitution held to prohibit only unreasonable searches and seizures. *Moore v. State*, 138 Miss. 116, 103 So. 483 (1925).

Reasonableness of search or seizure is judicial question for court in each case. *Moore v. State*, 138 Miss. 116, 103 So. 483 (1925).

Search warrant after date fixed therein for execution and return becomes functus officio. *Taylor v. State*, 137 Miss. 217, 102 So. 267 (1924).

Search of premises under warrant obtained after partial search without warrant or permission unlawful. *Robinson v. State*, 136 Miss. 850, 101 So. 706 (1924).

Land of owner cannot be searched without his consent, except by state or county officer having lawful search warrant. *Helton v. State*, 136 Miss. 622, 101 So. 701 (1924).

Who may avail of constitutional privilege against unlawful searches and seizures stated. *Lee v. City of Oxford*, 134 Miss. 647, 99 So. 509 (1924).

Constitutional prohibition of unreasonable seizure or search extends to all property and possessions. *Falkner v. State*, 134 Miss. 253, 98 So. 691 (1924).

Officer held not permitted to make search without valid warrant. *State v. Watson*, 133 Miss. 796, 98 So. 241 (1923).

Constitutional prohibition against unreasonable searches and seizures held not to refer to unauthorized acts of private persons. *Hampton v. State*, 132 Miss. 154, 96 So. 165 (1923).

## 2. Affidavit, sufficiency.

The description in the affidavit and search warrant was sufficient to authorize a search where the sheriff, who made the affidavit, swore in the affidavit that intoxicating liquor was near the residence of "John Doe," and then particularly described the location, it appearing that at the time the sheriff was without knowledge as to the ownership of the house. *Traxler v. State*, 244 Miss. 403, 142 So. 2d 14 (1962).

The affidavit upon which a warrant was issued to search the premises of appellant which did not describe affiant as a credible person was not invalid despite the language of this section [Code 1942, § 2614] providing "upon the affidavit of any credible person," etc. *West v. State*, 49 So. 2d 271 (Miss. 1950).

Affidavit for search warrant should recognize, in compliance with directory provisions of statutes, that affiant is credible person, not because statute requires affidavit to so state, but because it is safer practice that the fact of affidavit having been made by credible person should be given attestation by jurat of officer before whom it is made. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

Issuance of search warrant is adjudication that affidavit on which the warrant is issued was made by credible person, especially in absence of any proof to contrary. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

Description of premises of defendant in affidavit and search warrant as "located at 97 feet on First Street by 148 feet on Warren Avenue, Lot A, Block 4, Swalm Subdivision," and authorizing search of buildings and vehicles owned or used by

defendant located as stated, is sufficient description of lot used by defendant, 50 feet by 60 feet, on corner, being portion of described property which was owned by defendant's family, since description was sufficient to enable officer to locate with reasonable certainty place to be searched, and officer did locate it by means of such description without difficulty. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

This section [Code 1942, § 2614] does not require that the affidavit for search warrant recite that affiant is a credible person, but affidavit of such person that he has reason to believe and does believe certain facts as stated in this section entitles proper officer to issue search warrant. *Serio v. Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950); *Harper v. State*, 209 Miss. 563, 47 So. 2d 854 (1950).

Affidavit should allege that affiant is a credible person, and is fatally defective if it omits the allegation that the affiant, if he does not have personal knowledge, has reason to believe and does believe that the offense is being or has been committed. *Laster v. Ard*, 42 So. 2d 737 (Miss. 1949).

Affidavit form, signed by sheriff, for issuance of search warrant in intoxicating liquor case, presented to justice of the peace by deputy sheriff, violates requirement of Art. 3, § 23 of Constitution that search warrant be supported by oath or affirmation, where sheriff was not personally present before justice of the peace, and evidence obtained under search warrant issued pursuant to such affidavit was illegally obtained and inadmissible in evidence. *Boyd v. State*, 206 Miss. 573, 40 So. 2d 303 (1949).

Description in affidavit and search warrant of the premises to be searched for intoxicating liquor as being "in the dwelling house, outhouses, on the premises, in the automobiles or other vehicles used or occupied by, and on the person of Earl Smith \_\_\_\_\_ at \_\_\_\_\_ located on the Terry Highway about 250 yards south of the city limits of Jackson and on the east side of said Terry Highway facing west in said county and state," was sufficient. *Smith v. State*, 187 Miss. 96, 192 So. 436 (1939).

Affidavit for search warrant, made at mayor's suggestion, where another in-



formed affiant defendant possessed liquor, held sufficient. *Buck v. State*, 153 Miss. 710, 121 So. 147 (1929).

Affidavit for search warrant held void for failure to allege that liquors were kept for purpose of sale in violation of law. *Estes v. State*, 152 Miss. 555, 120 So. 444 (1929).

Affidavit alleging liquors were being sold or offered for sale in violation of law held sufficient to authorize issuance of search warrant. *Banks v. City of Jackson*, 152 Miss. 844, 120 So. 209 (1929).

Search warrant affidavit alleging liquor was being manufactured, possessed, sold, or offered for sale or given away in violation of law held not defective because joining several grounds disjunctively. *Banks v. City of Jackson*, 152 Miss. 844, 120 So. 209 (1929).

Affidavit for liquor search warrant, sufficiently describing premises, but alleging they were used by unknown occupant, held sufficient. *Banks v. City of Jackson*, 152 Miss. 844, 120 So. 209 (1929).

Affidavit for liquor search warrant describing place by street and number is sufficient. *Banks v. City of Jackson*, 152 Miss. 844, 120 So. 209 (1929).

Affidavit for search warrant held sufficient, though not signed by affiant. *Winters v. State*, 142 Miss. 71, 107 So. 281 (1926).

Description of places and things in affidavit and search warrant held sufficient; any description of places or things to be searched enabling officer to locate them with reasonable certainty is sufficient. *Borders v. State*, 138 Miss. 788, 104 So. 145 (1925); *Mason v. State*, 32 So. 2d 140 (Miss. 1947).

Affidavit for search warrant held sufficient as to description of premises. *Mathews v. State*, 134 Miss. 807, 100 So. 18 (1924).

Affidavit for search warrant must specially designate place to be searched. *Spears v. State*, 99 So. 361 (Miss. 1924).

Charge that defendant violated law equivalent to charging that act was done unlawfully. *Bufkin v. State*, 134 Miss. 1, 98 So. 452 (1923).

Affidavit for search warrant held sufficient to describe liquors to be seized. *Loeb v. State*, 133 Miss. 883, 98 So. 449 (1923).

Affidavit must aver reasons to believe and actual belief that liquors are being kept on premises. *State v. Watson*, 133 Miss. 796, 98 So. 241 (1923).

Affidavit for search warrant, not stating belief as to violation, held void. *Turner v. State*, 133 Miss. 738, 98 So. 240 (1923); *State v. Watson*, 133 Miss. 796, 98 So. 241 (1923); *Porter v. State*, 135 Miss. 789, 100 So. 377 (1924); *Morrison v. State*, 140 Miss. 221, 105 So. 497 (1925).

### 3. Probable cause for issuing warrant.

An affidavit for a search warrant which does not allege any facts or circumstances from which the justice of the peace could judicially ascertain or determine probable cause, but sets forth nothing more than conclusions of the affiant, violates the Fourth Amendment to the federal constitution. *Walker v. State*, 192 So. 2d 270 (Miss. 1966); *Harkins v. State*, 193 So. 2d 133 (Miss. 1966).

Issuance of search warrant is no longer a conclusive judicial finding that probable cause existed for search. *O'Bean v. State*, 184 So. 2d 635 (Miss. 1966).

Issuance of warrant is adjudication that there was probable cause therefor, and such adjudication is conclusive and cannot be collaterally attacked on issue between state and accused as to latter's guilt or innocence. *Harper v. State*, 209 Miss. 563, 47 So. 2d 854 (1950).

A judicial finding of the officer issuing the search warrant, of the existence of probable cause therefor, is conclusive and cannot be inquired into. *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438 (1943).

The issuing of a search warrant on the affidavit made by the sheriff is res adjudicata of the sufficiency of the affidavit, which cannot be inquired into on appeal from conviction in a prosecution for transporting intoxicating liquor. *Carr v. State*, 187 Miss. 535, 192 So. 569 (1940).

In a prosecution for unlawful possession of intoxicating liquor, the credibility of the informant and question of probable cause in connection with the search and seizure could not be attacked where a valid search warrant was issued, its issuance being a conclusive adjudication that there was probable cause. *Goss v. State*, 187 Miss. 72, 192 So. 447 (1939).



The sufficiency of the officer's reason for making the affidavit may not be inquired into where the justice of the peace, in compliance with the statutory duty, has issued the warrant after adjudging the facts to be sufficient to constitute probable cause, there being a difference between a search upon probable cause without affidavit and warrant, in which case the question of probable cause is open to inquiry, and a case where a justice of the peace or other officer authorized to issue a warrant adjudges the existence of probable cause by issuing a warrant upon the affidavit. *Creel v. State*, 183 Miss. 158, 183 So. 510 (1938).

Affidavit for search warrant held to show probable cause. *Bufkin v. State*, 134 Miss. 1, 98 So. 452 (1923).

What constitutes "probable cause" justifying writ of seizure stated. *Loeb v. State*, 133 Miss. 883, 98 So. 449 (1923).

#### 4. Warrant, sufficiency.

The description in the affidavit and search warrant was sufficient to authorize a search where the sheriff, who made the affidavit, swore in the affidavit that intoxicating liquor was near the residence of "John Doe," and then particularly described the location, it appearing that at the time the sheriff was without knowledge as to the ownership of the house. *Traxler v. State*, 244 Miss. 403, 142 So. 2d 14 (1962).

Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and things to be searched are designated in such manner that the officer making the search may locate them with reasonable certainty. *West v. State*, 42 So. 2d 751 (Miss. 1949).

Description in search warrant of defendant's residence as being located on certain road one and one-half miles from certain city was not insufficient merely because it did not state in which direction from the city limits the property to be searched was located. *West v. State*, 42 So. 2d 751 (Miss. 1949).

Omission of the official position of person before whom search warrant was returnable did not render warrant void; such position may be shown by proof other than by warrant or affidavit. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

Search warrant returnable before issuing justice of peace on "the . . . day of May, 1949" does not comply with mandatory provision of this section [Code 1942, § 2614] that warrant "shall be returnable instant or on a day stated," and search conducted under authority of such warrant is illegal. *Buxton v. State*, 205 Miss. 692, 39 So. 2d 310 (1949).

Warrant which describes the place to be searched as "in the residence" and the outhouses and grounds "near the residence" of a specified person does not authorize a search of the residence of another 150 yards away, even though the residence of such other person is owned by the person specified in the warrant and is located on the same tract of land. *Cox v. State*, 201 Miss. 568, 29 So. 2d 661 (1947).

A search warrant describing location to be searched as in the dwelling house, outhouses on the premises used or occupied by a named individual on the place of another named individual "on cross roads 2 miles south of Soreby's store in 2nd house on left side of road," was sufficiently definite so as to be valid where the officer located the place to be searched from such description. *Williams v. State*, 198 Miss. 848, 23 So. 2d 692 (1945).

Description in affidavit and search warrant of the premises to be searched for intoxicating liquor as being "in the dwelling house, outhouses, on the premises, in the automobiles or other vehicles used or occupied by, and on the person of Earl Smith \_\_\_\_\_ at \_\_\_\_\_ located on the Terry Highway about 250 yards south of the city limits of Jackson and on the east side of said Terry Highway facing west in said county and state," was sufficient. *Smith v. State*, 187 Miss. 96, 192 So. 436 (1939).

The omission of the word "good" is not fatal to the affidavit and search warrant, since the statute uses the words "has reason to believe and does believe," notwithstanding that the court in *State v. Watson*, 133 M 796, 98 So 241, said that the affidavit should state that the affiant had "good reason to believe and does believe." *Creel v. State*, 183 Miss. 158, 183 So. 510 (1938).

Making search warrant issued by competent judicial officer returnable before

circuit court did not render it void. *Hanson v. State*, 174 Miss. 88, 164 So. 9 (1935).

Search warrant having caption, "State of Mississippi, Bolivar County: To any lawful officer of Bolivar County, Mississippi" held valid. *Mai v. State*, 152 Miss. 225, 119 So. 177 (1928), overruled on other grounds, *O'Bean v. State*, 184 So. 2d 635 (Miss. 1966).

Search warrant made returnable to past date was void. *Buckley v. State*, 150 Miss. 808, 117 So. 115 (1928).

Search warrant with no return day named therein held illegal and evidence procured thereby inadmissible under this section [Code 1942, § 2614]. *Powell v. State*, 146 Miss. 677, 111 So. 738 (1927).

Search warrant held not vitiated by command to officer to bring liquor, if practicable, before officer issuing warrant. *Hendricks v. State*, 144 Miss. 87, 109 So. 263 (1926).

"John Doe" warrant held void. *Brewer v. State*, 142 Miss. 100, 107 So. 376 (1926).

Description of places and things in affidavit and search warrant held sufficient; any description of places or things to be searched enabling officer to locate them with reasonable certainty is sufficient. *Borders v. State*, 138 Miss. 788, 104 So. 145 (1925).

Search warrant directed to any lawful officer and executed by sheriff held not void. *Matthews v. State*, 134 Miss. 807, 100 So. 18 (1924).

Search warrant may be returnable in less than five days from issuance. *Bufkin v. State*, 134 Miss. 1, 98 So. 452 (1923).

Warrant for search of "premises" held invalid. *Rignall v. State*, 134 Miss. 169, 98 So. 444 (1923).

A search warrant is void which does not specifically designate the place to be searched and the person and thing to be seized. *Miller v. State*, 129 Miss. 774, 93 So. 2 (1922); *Smith v. State*, 133 Miss. 730, 98 So. 344 (1923); *Owens v. State*, 133 Miss. 753, 98 So. 233 (1923); *State v. Watson*, 133 Miss. 796, 98 So. 241 (1923); *Loeb v. State*, 133 Miss. 883, 98 So. 449 (1923); *Fatimo v. State*, 134 Miss. 175, 98 So. 537 (1924); *Falkner v. State*, 134 Miss. 253, 98 So. 691 (1924); *Spears v. State*, 99 So. 361 (Miss. 1924); *Butler v. State*, 135 Miss. 885, 101 So. 193 (1924); *Sanders v.*

*State*, 141 Miss. 615, 106 So. 822 (1926); *Webb v. Sardis*, 143 Miss. 92, 108 So. 442 (1926).

### 5. Variance between warrant and affidavit.

Warrant which did not conform to affidavit, nor authorize search of particular place described therein, void. *Morton v. State*, 136 Miss. 284, 101 So. 379 (1924).

### 6. Who may issue warrant.

The mayor of the town of Louin by virtue of his office as police justice and as ex officio justice of the peace, had the power as an ex officio justice of the peace to issue the search warrant and it was not necessary in order to give validity to his act in issuing the search warrant that he add the title ex officio justice of peace to his official signature as mayor. *Simmons v. Town of Louin*, 213 Miss. 482, 57 So. 2d 133 (1952).

Issuance of a search warrant by a justice of the peace of one district of the county from another justice of the peace district of the county did not make the search warrant and subsequent conviction of unlawful possession of intoxicating liquor void, since such issuance of the search warrant was not a judicial act and was authorized. *McGowan v. State*, 189 Miss. 450, 196 So. 222 (1940).

When a town is located partly in two counties, the county line running through the municipality, the mayor is nevertheless the mayor of the entire town and in consequence is an ex officio justice of the peace throughout the entire limits of the municipality, including that part in one county as well as the other; and being so, he is a justice of the peace ex officio of both counties and has authority, while acting within the municipality, to issue a search warrant authorizing a search for unlawful possession of intoxicating liquors to be executed in any part of either one of the two counties. *Hathaway v. State*, 188 Miss. 403, 195 So. 323 (1940).

Mayor of city having police justice has no function as ex officio justice of peace, and affidavit taken and search warrant issued by him are void, and evidence obtained thereunder inadmissible. *Palmer v. City of Lumberton*, 153 Miss. 886, 122 So. 199 (1929).



Justice of the peace may issue search warrant for execution in any part of the county; search warrant made returnable to issuing justice in district other than where search made does not render it void. *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924).

City clerk has no authority to issue search warrant. *Porter v. State*, 135 Miss. 789, 100 So. 377 (1924).

Only magistrate before whom proper affidavit filed may issue search warrant. *City of Jackson v. Howard*, 135 Miss. 102, 99 So. 497 (1924).

Any justice may issue search warrant for his county on proper affidavit. *Bufkin v. State*, 134 Miss. 1, 98 So. 452 (1923).

Mayor may issue search warrant to be served outside city limits. *Falkner v. State*, 98 So. 345 (Miss. 1923).

### 7. Who may serve warrant.

The fact that a search warrant, directed to any lawful officer of the town of Louin, was delivered by the marshal to, and served by, the sheriff, did not make the service of the warrant upon defendant in a prosecution for unlawful possession of intoxicating liquor illegal, where the marshal was present when the sheriff delivered a copy of the search warrant to the defendant, and the marshal had a right to summon such aid as in his judgment was needed to execute the search warrant both by the terms of the statute and the warrant itself, and either of the officers could have made a valid return on the warrant. *Simmons v. Town of Louin*, 213 Miss. 482, 57 So. 2d 133 (1952).

Appointment by court during vacation of special officer to serve search warrant is void in absence of written application for appointment of special officer, search made thereunder is not warranted and evidence obtained by reason of such search is inadmissible. *Claunch v. State*, 208 Miss. 767, 45 So. 2d 581 (1950).

Application for search warrant, whether under Code 1942, § 2604, or this section [Code 1942, § 2614], is not also an application for appointment of special officer to serve it under Code 1942, § 1877, since sections dealing with search warrants make no provision for prayer for appointment of special officer to serve same, all such process being directed to be

addressed to lawful officer. *Claunch v. State*, 208 Miss. 767, 45 So. 2d 581 (1950).

In determining when a coroner may lawfully execute a search warrant for the search and seizure of intoxicating liquor, statute (Code 1942, § 3906), prescribing occasions on which a coroner may perform the duties of a sheriff, must be read in connection with this section [Code 1942, § 2614]. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

Search warrant for the search and seizure of intoxicating liquor may properly be delivered to the coroner where the warrant is addressed to a sheriff who falls within any of the disqualifications and exceptions listed in Code 1942, § 3906, but in dealing with the writ the coroner performs the functions of the sheriff and not those of the coroner. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

Warrant directing search for and seizure of intoxicating liquor, issued merely to any lawful officer of the county, constitutes a legal search warrant, but the coroner, unless the sheriff is disqualified under Code 1942, § 3906, cannot lawfully serve it. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

Coroner, in serving, as directed, warrant for the search and seizure of intoxicating liquor while acting as coroner and in no other capacity and for no other reason except that he is coroner, usurps the duties and prerogatives of the sheriff. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

City policeman could serve within city warrant issued by justice of peace directed to any lawful officer of county, and evidence secured under such warrant is competent. *Keys v. State*, 155 Miss. 574, 124 So. 789 (1929).

### 8. Return of service.

Liquor search warrant was not void and evidence was not inadmissible because officer's return was defective, since return was amendable. *Banks v. City of Jackson*, 152 Miss. 844, 120 So. 209 (1929).

### 9. Execution of warrant.

While law enforcement officers by virtue of a search warrant for intoxicating liquor had a legal right to break into a house and make a search therein for in-



toxicating liquor even though the house was locked and no one at home, and were entitled to a reasonable time to make the search, they did not have a right to remain in the house in darkness from 10 o'clock until midnight. *Smith v. State*, 233 Miss. 503, 102 So. 2d 699 (1958).

It is not necessary for an officer to search the entire premises for the owner and to ascertain first whether the owner is anywhere on the premises before he can properly serve a search warrant upon the person in possession of the premises, and the fact that the defendant might have been in the backyard unknown to the sheriff, does not vitiate the service. *Brown v. State*, 222 Miss. 863, 77 So. 2d 694 (1955).

Code 1942, § 1859, applies to service of summons in civil actions and has no application to the service of search warrant under this section [Code 1942, § 2614] which provides that copy of search warrant shall be served on owner or person in possession of premises if such person is present or readily found. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Act of officers in leaving copy of search warrant on bed of owner of premises searched did not render search void when defendant was not present at time of search, as it was not necessary to serve copy of writ on anyone or to post copy on his door under this section [Code 1942, § 2614]. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Search warrant authorizes search of locked metal box or locker in outhouse in backyard of lot on which defendant's residence is situated when property to be searched, as described in both affidavit and warrant, includes residence and outhouses on premises. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Search warrant returnable instant but not served until the next day after its date did not render process void. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

This section [Code 1942, § 2614] is the exclusive statute dealing with search warrants in intoxicating liquor crimes and service of process should be made in manner herein set out and not in any one of modes authorized by Code 1942, § 1859,

for service of summons. *Buxton v. State*, 205 Miss. 692, 39 So. 2d 310 (1949).

Search warrant on which search of premises has been made, evidence obtained, and defendant convicted, is *functus officio*; that is, it has fulfilled purpose of its creation and is of no further virtue or effect. *Riley v. State*, 204 Miss. 562, 37 So. 2d 768 (1948).

That the sheriff failed to inform the defendant in a prosecution for transporting intoxicating liquor that he had a warrant before searching their automobile did not affect the admissibility of the evidence obtained by him thereunder. *Carr v. State*, 187 Miss. 535, 192 So. 569 (1940).

Search of outhouses under warrant for search of specified building, invalid. *Deaton v. State*, 137 Miss. 164, 102 So. 175 (1924).

Seizure of still under warrant to search premises for intoxicating liquors held unlawful. *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924).

Warrant for search of certain building held not to authorize search of yard. *Fatimo v. State*, 134 Miss. 175, 98 So. 537 (1924).

Search of property not described in warrant unlawful. *Vaughn v. State*, 136 Miss. 314, 101 So. 439 (1924); *Butler v. State*, 129 Miss. 778, 93 So. 3 (1922); *Owens v. State*, 133 Miss. 753, 98 So. 233 (1923).

Only room or building designated in search warrant may be searched. *Strangi v. State*, 134 Miss. 31, 98 So. 340 (1923).

## 10. Search of person.

Finding of liquor in purse on rear seat of car, belonging to woman in car, by officer making search of automobile under search warrant does not authorize officer to arrest without warrant former passenger who has left car and entered his own place of business and subsequent search of passenger's person is unlawful. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

Taking bag containing liquor from defendant's son about to leave premises being searched under proper warrant did not constitute an unlawful search of his person, making evidence obtained thereby inadmissible. *West v. State*, 42 So. 2d 751 (Miss. 1949).

Search of person before intoxicating liquor is found and lawful arrest made by

officer based thereon is unauthorized. *Robinson v. State*, 143 Miss. 247, 108 So. 903 (1926).

Arrest by officer and search of bag which he took from defendant's hand without search warrant was unlawful. *Webb v. Town of Sardis*, 143 Miss. 92, 108 So. 442 (1926).

Neither statute nor common law authorizes warrant for search of person, and evidence so secured is inadmissible against accused. *Duckworth v. Town of Taylorsville*, 142 Miss. 440, 107 So. 666 (1926).

Warrant to search person invalid, and liquor found on accused on search thereunder inadmissible. *Comby v. State*, 141 Miss. 561, 106 So. 827 (1926).

Search without warrant of sack dropped by defendant while fleeing from arrest which policeman had no authority to make held unlawful. *Butler v. State*, 135 Miss. 885, 101 So. 193 (1924).

#### 11. Evidence procured by search.

Evidence obtained during a search under a warrant was inadmissible in a prosecution for unlawful possession of intoxicating liquor, where the warrant was issued upon an affidavit which stated that the affiant had information from reliable informants that an illegal whisky distillery was concealed on the defendant's property and that the whisky was being stored for purposes of sale, such affidavit not stating facts upon which the justice could judicially determine probable cause. *Routh v. State*, 230 So. 2d 562 (Miss. 1970).

One not shown to have possession or control of the premises searched may not object to introduction of evidence obtained by an illegal search. *Walker v. State*, 237 Miss. 470, 115 So. 2d 159 (1959).

In a proceeding to confiscate and sell automobile on the ground that the automobile was being used for transportation of whisky, the testimony of the sheriff that the person who gave him the information was not a credible person justified the trial court's conclusion that the sheriff did not have probable cause for seizing and searching the automobile without a warrant and the evidence obtained was not admissible. *State, ex rel. Kemper County*

*v. Brown*, 219 Miss. 383, 68 So. 2d 419 (1953).

Evidence that officers, who had no search warrant, took defendant's suitcase off train after he had alighted, asked what was in it, and arrested defendant when he replied "whisky," then returned it to defendant who carried it to police station where sheriff told defendant to open suitcase and officers saw for first time that it contained whisky was illegally obtained and inadmissible in prosecution for unlawful possession of liquor. *Harris v. State*, 209 Miss. 183, 46 So. 2d 194 (1950).

Conviction of unlawful possession of intoxicating liquor cannot be sustained when proof of fact arises out of evidence obtained in violation of defendant's constitutional rights to be secure in person, house and possession from unreasonable search and seizure. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

Evidence of search of defendant's premises and finding parts of still was admissible notwithstanding affidavit and search warrant were lost where state made oral proof of that fact and of the substance of those documents before the trial judge. *Jefferson v. State*, 207 Miss. 576, 42 So. 2d 772 (1949).

Evidence procured under search warrant issued pursuant to affidavit which was fatally defective for failure to recite that affiant was a "credible person" and that affiant "has reason to believe and does believe" etc., was inadmissible and search was unlawful. *Laster v. Ard*, 42 So. 2d 737 (Miss. 1949).

Conviction based on evidence obtained under a search warrant illegal because return day was left blank was reversed. *Buxton v. State*, 205 Miss. 692, 39 So. 2d 310 (1949).

Evidence obtained by second search, under original search warrant, is inadmissible against defendant when second search is made after original search had been completed and evidence obtained, and after defendant was arrested, plead guilty and paid fine. *Riley v. State*, 204 Miss. 562, 37 So. 2d 768 (1948).

Warrant issued by justice of the peace addressed and delivered to the coroner as such directing him to search for and seize intoxicating liquor although the sheriff



suffered no disqualification within the purview of Code 1942, § 3906, and which was served, as directed, by the coroner while acting as such officer was illegal and evidence obtained under authority of the search warrant was inadmissible, notwithstanding that the warrant was also addressed to any lawful officer of the county. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

The failure of the state in a prosecution for transporting intoxicating liquor to introduce the affidavit and search warrant in evidence was waived, where no objection to the evidence was made. *Carr v. State*, 187 Miss. 535, 192 So. 569 (1940).

Evidence secured by policeman under search warrant issued by justice directed to any lawful officer of county held competent. *Keys v. State*, 155 Miss. 574, 124 So. 789 (1929).

Evidence obtained on search held admissible against wife of occupant named in affidavit and warrant. *Cox v. State*, 146 Miss. 685, 112 So. 479 (1927).

Admission of evidence obtained by unlawful search held not prejudicial, where defendant made no specific objection nor motion to exclude testimony, but obtained instruction eliminating it from jury's consideration. *Bailey v. State*, 143 Miss. 210, 108 So. 497 (1926).

Testimony obtained by search, without warrant, of bundle tied to saddle on horse, on mere suspicion of liquor being there, is inadmissible. *Canteberry v. State*, 142 Miss. 462, 107 So. 672 (1926).

Wife may, on offer of evidence against her, complain of search of home rented or owned by husband on void warrant. *Brewer v. State*, 142 Miss. 100, 107 So. 376 (1926).

Evidence secured on search of defendant's home on warrant against another held inadmissible, though legal title to land in his wife. *Sanders v. State*, 141 Miss. 615, 106 So. 822 (1926).

Admission of evidence obtained by illegal search not rendered harmless by defendant's admission of one only of facts in testimony. *Nicaise v. State*, 141 Miss. 611, 106 So. 817 (1926).

Officer arresting one for violation of prohibition laws without warrant, held competent witness; liquor seized by officer

without warrant, on admission of accused that he had liquor, may be introduced in evidence. *Nicaise v. State*, 141 Miss. 611, 106 So. 817 (1926).

Evidence obtained on search of defendant's residence, on search warrants against others, inadmissible against him. *Harrell v. State*, 140 Miss. 737, 106 So. 268 (1925).

For evidence obtained by search without warrant to be inadmissible it must appear that such property was owned or was in possession of accused. *Lovern v. State*, 140 Miss. 635, 105 So. 759 (1925).

Copies of lost search warrant and affidavit therefor admissible on defendant's demand for showing before admission of evidence obtained. *Mitchell v. State*, 139 Miss. 108, 103 So. 815 (1925).

Affidavit and search warrant must be produced on demand or loss explained before evidence obtained by lawful search admissible. *Wells v. State*, 135 Miss. 764, 100 So. 674 (1924); *Nelson v. State*, 137 Miss. 170, 102 So. 166 (1924); *Pickle v. State*, 151 Miss. 549, 118 So. 625 (1928).

Evidence procured by unlawful search or seizure is inadmissible. *Tucker v. State*, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922); *Williams v. State*, 129 Miss. 469, 92 So. 584 (1922); *Butler v. State*, 129 Miss. 778, 93 So. 3 (1922); *State v. Patterson*, 130 Miss. 680, 95 So. 96 (1923); *Smith v. State*, 133 Miss. 730, 98 So. 344 (1923); *Owens v. State*, 133 Miss. 753, 98 So. 233 (1923); *Strangi v. State*, 134 Miss. 31, 98 So. 340 (1923); *Taylor v. State*, 134 Miss. 110, 98 So. 459 (1924); *Rignall v. State*, 134 Miss. 169, 98 So. 444 (1923); *Falkner v. State*, 134 Miss. 253, 98 So. 691 (1924); *Spears v. State*, 99 So. 361 (Miss. 1924); *McCarthy v. Gulfport*, 134 Miss. 632, 99 So. 501 (1924); *Cuevas v. Gulfport*, 134 Miss. 644, 99 So. 503 (1924); *Matthews v. State*, 134 Miss. 807, 100 So. 18 (1924); *Wells v. State*, 135 Miss. 764, 100 So. 674 (1924); *Jordan v. State*, 135 Miss. 785, 100 So. 384 (1924); *Butler v. State*, 135 Miss. 885, 101 So. 193 (1924); *Morton v. State*, 136 Miss. 284, 101 So. 379 (1924); *Vaughn v. State*, 136 Miss. 314, 101 So. 439 (1924); *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924); *Robinson v. State*, 136 Miss. 850, 101 So. 706 (1924); *Deaton v. State*, 137 Miss. 164, 102 So. 175 (1924); *Borders*



v. State, 138 Miss. 788, 104 So. 145 (1925); Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129 (1925); Harrell v. State, 140 Miss. 737, 106 So. 268 (1925); Comby v. State, 141 Miss. 561, 106 So. 827 (1926); Nicaise v. State, 141 Miss. 611, 106 So. 817 (1926); Brewer v. State, 142 Miss. 100, 107 So. 376 (1926); Duckworth v. Town of Taylorsville, 142 Miss. 440, 107 So. 666 (1926); Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926); Buxton v. State, 205 Miss. 692, 39 So. 2d 310 (1949); Haney v. State, 43 So. 2d 383 (Miss. 1949); Kelly v. State, 43 So. 2d 383 (Miss. 1949).

## 12. Miscellaneous.

Defendant appealing from conviction may not raise a question where there was a valid search warrant, for the reason that the officers did not enter upon or search the premises belonging to the defendant. *Miles v. State*, 51 So. 2d 214 (Miss. 1951).

Officer was authorized to arrest defendant for unlawful possession of liquor without warrant only if misdemeanor was being knowingly committed in his presence. *Kelly v. State*, 43 So. 2d 383 (Miss. 1949).

Trial and conviction of accused for unlawful possession of intoxicating liquor in the circuit court on an indictment was valid, and fact that the intoxicating liquor in question was found and seized in accused's home under a search warrant issued to the sheriff by a justice of the peace did not place jurisdiction in the justice's court to the exclusion of the circuit court where no affidavit was made before the justice of the peace charging her with unlawful possession of intoxicants, since a

charging affidavit is essential to jurisdiction in the justice of the peace court. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

The affidavit for a search warrant is not, and cannot be, a substitute for the affidavit charging the offense of unlawful possession of intoxicating liquor so as to give a justice court jurisdiction of the offense. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

Officer may arrest without warrant person committing felony not in his presence or on reasonable grounds amounting to probable cause to believe that person has committed felony. *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925).

Sheriff informed by credible witness of presence of still may go on premises without warrant to seize it; sheriff informed by credible witness of presence of still may go on premises without warrant to arrest person possessing it. *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925).

Neither the affidavit for search warrant, nor the warrant, is evidence of venue. *Sandifer v. State*, 136 Miss. 836, 101 So. 862 (1924).

Defendant held not to have invited search without valid search warrant. *Morton v. State*, 136 Miss. 284, 101 So. 379 (1924).

Requirement of search warrant held not waived. *Smith v. State*, 133 Miss. 730, 98 So. 344 (1923).

City marshal presumed to know search and seizure law. *United States Fid. & Guar. Co. v. State*, 121 Miss. 369, 83 So. 610 (1920).

## RESEARCH REFERENCES

**ALR.** Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 A.L.R.4th 1266.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

What circumstances fall within "inevitable discovery" exception to rule preclud-

ing admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 A.L.R. Fed. 331.

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 431 et seq.

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 551, 552, 560 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 27:9.

# § 99-27-17. Affidavit for search warrant; form.

The form of affidavit may be as follows:

## **Affidavit for search warrant.**

“State of Mississippi,

\_\_\_\_\_ County.

This day personally appeared before me, the undersigned officer of said county, \_\_\_\_\_ of said county, who is known to be a credible person, who upon his oath says that he has reason to believe, and does believe, that intoxicating liquor is being (strike out any of the following not to be sworn to):

(1) Stored, kept, owned, controlled or possessed for purposes of sale in violation of law,

(2) Sold or offered for sale in violation of law,

(3) Manufactured or distilled, in violation of law,

(4) Attempted to be manufactured or distilled in violation of law,

(5) Attempted to be transported in violation of law, in the residence, outhouses, barns, stalls, smokehouses, crib, and in the field, yard, and garden and woods near the residence of \_\_\_\_\_ in the \_\_\_\_\_ district of said \_\_\_\_\_ County, Mississippi, and on Section \_\_\_\_\_ Township \_\_\_\_\_, Range \_\_\_\_\_ in said \_\_\_\_\_ County, Mississippi, and more particularly described as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

in violation of the laws of the state of Mississippi.

And that intoxicating liquor is being transported and attempted to be transported in a wagon, cart, automobile, or other vehicle along the public road in said county known as \_\_\_\_\_ public road, in violation of the laws of said state of Mississippi. And this belief is not feigned of malice against \_\_\_\_\_ who is believed to be guilty of said violations, but is founded on credible information.

Wherefore, affiant prays a search warrant directing a search of the above mentioned places and things, and seizure of the intoxicating liquor, stills, or integral parts thereof, and of the vehicles and receptacles used and employed in the concealment and transportation thereof, and the arrest of the said \_\_\_\_\_ and any other person or persons in charge, possession or control, guilty of violating the prohibition laws of the state.

\_\_\_\_\_ Affiant.

Sworn to and subscribed before me, the \_\_\_\_\_ day of \_\_\_\_\_ 2\_\_\_\_\_.

\_\_\_\_\_  
(Official title)”

**SOURCES:** Codes, 1930, § 1977; Laws, 1942, § 2616; Laws, 1924, ch. 244.

**Cross References** — Seizure of alcoholic beverages and other related personal property subject to forfeiture for unlawful possession thereof, see §§ 67-1-17, 67-1-18. Affidavit to obtain search warrant generally, see § 99-25-15. Contents of search warrant, see § 99-27-15. Form of search warrant, see § 99-27-19.

### RESEARCH REFERENCES

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 431 et seq. **CJS.** 48 C.J.S., Intoxicating Liquors §§ 551, 552, 560 et seq.  
5 Am. Jur. Trials 331, Excluding Illegally Obtained Evidence §§ 1 et seq.

## § 99-27-19. Search warrant; form.

The form of search warrant may be as follows:

### Search Warrant.

"State of Mississippi,

\_\_\_\_\_ County.

To any lawful officer of \_\_\_\_\_ County:

Whereas, \_\_\_\_\_ has this day made complaint on oath, before the undersigned officer in and for said county, that he has reason to believe, and does believe, that intoxicating liquor is being (strike out any of the following not sworn to):

(1) Stored, kept, owned, controlled or possessed for purposes of sale in violation of law

(2) Sold or offered for sale in violation of law

(3) Manufactured or distilled in violation of law

(4) Attempted to be manufactured or distilled in violation of law

(5) Attempted to be transported in violation of law in the residence, outhouses, barns, stalls, smokehouses, crib, and in the yard and garden, and in the field and woods near the residence of \_\_\_\_\_ in the \_\_\_\_\_ district of said \_\_\_\_\_ County and on Section \_\_\_\_\_ Township \_\_\_\_\_ Range \_\_\_\_\_ in said county, and more particularly described as follows:

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violation of the laws of the state of Mississippi;

And that intoxicating liquor is being transported and attempted to be transported in a wagon, cart, automobile or other vehicle along the public road in said county known as the \_\_\_\_\_ public road, in violation of the laws of the state of Mississippi. And that \_\_\_\_\_ is suspected of being guilty of said violations in said county and state. And the undersigned having examined and considered said affidavit, and also after having heard and considered evidence in support thereof, doth find that probable cause for the issuance of a search warrant in the premises doth exist;



Wherefore, we command you that with such aid as in your judgment shall be needed, you do proceed in the day, or nighttime, to enter by breaking, if necessary, and to diligently search said above described places, or any of them, or said described vehicles and automobiles, in said county and state, for said intoxicating liquor, stills, and integral parts thereof, vehicles and receptacles and appliances as are used in connection therewith, making known to the person or persons in control thereof, if any, your authority for so doing, and if any intoxicating liquor, stills, or still, or integral part or parts thereof, vehicles, vessels, receptacles, as are used in connection therewith be found, that you seize same, and if practicable, that you bring them before me at my office instanter, and also arrest the said \_\_\_\_\_ and all other persons as may be in possession or control thereof, and bring them before me, and have then and there this writ, with your proceedings noted thereon. Herein fail not.

Witness my hand, this the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
(Official title)"

**SOURCES:** Codes, 1930, § 1978; Laws, 1942, § 2617; Laws, 1924, ch. 244.

**Cross References** — Seizure of alcoholic beverages and other related personal property subject to forfeiture for unlawful possession thereof, see §§ 67-1-17, 67-1-18.

Search warrant and *capias* generally, see § 99-25-17.

Contents of search warrant, see § 99-27-15.

Form of affidavit for search warrant, see § 99-27-17.

## JUDICIAL DECISIONS

### 1. In general.

Statute prescribing form of search warrant held not to violate Const. 1890, § 169. *Mai v. State*, 152 Miss. 225, 119 So.

177 (1928), overruled on other grounds, *O'Bean v. State*, 184 So. 2d 635 (Miss. 1966).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. Trials 331, Excluding Illegally Obtained Evidence §§ 1 et seq.

### § 99-27-21. Search of motor vehicles, etc. and seizure of liquor without warrant.

It shall be the duty of any sheriff or constable of a county, or any sheriff, constable or marshal, or policeman in a municipality who has reason to believe and does believe that intoxicating liquor is being transported in violation of law, in any wagon, cart, buggy, automobile, motorcycle, motor truck, water or air craft, or any other vehicle, forthwith to make a reasonable search of such vehicle and to seize any intoxicating liquor so found being transported or being attempted to be transported in violation of law and at once to arrest the person or persons in possession or control thereof and transporting or attempting to

transport same in violation of law; and such officer or officers proceeding in good faith shall not be liable either civilly or criminally for such a search and seizure without a warrant, so long as said search and seizure is conducted in a reasonable manner, it appearing that the officer or officers had reason to believe and did believe that the prohibition laws of the State of Mississippi were being violated at the time such search was instituted. And the officers making such search shall be a competent witness, or witnesses, to testify as to all facts ascertained, and discoveries made, by means of said reasonable search, and all liquor, and all appliances for its manufacture or transportation, so seized shall be admitted in evidence. But this section shall not authorize the search of a residence or home or room or building or the premises belonging to or in the possession lawfully of the party suspected, without a search warrant.

**SOURCES:** Codes, 1930, § 1976; Laws, 1942, § 2615; Laws, 1924, ch. 244.

**Cross References** — Seizure without process of property subject to forfeiture because of unlawful possession of alcoholic beverages, see § 67-1-17.

Intoxicating beverage offenses, see §§ 97-31-5 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Probable cause; reasonableness of search.

#### 1. In general.

This section [Code 1942, § 2615] relative to the search of automobiles, as well as all other provisions relative to search and seizure, is construed strictly against the state. *Stafford v. State*, 193 So. 2d 119 (Miss. 1966).

An arrest begins when the officer begins his pursuit for the purpose of making it, and if he does not have the authority to make an arrest for possession of whisky at the instant he begins his pursuit of an automobile for that purpose, the fact that the person the officer is pursuing violates a traffic law in making his escape does not thereby authorize the arrest which began unlawfully. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

A search of an automobile following an illegal arrest of the driver is not legal. *Smith v. State*, 240 Miss. 738, 128 So. 2d 857 (1961).

In prosecution for unlawful transportation of intoxicating liquor, evidence of finding whisky on premises of third person after sheriff saw the accused place the whisky there, was not incompetent because the sheriff had no warrant, since

one who has no interest in the premises is not in position to invoke objection to the officers going thereon. *Harris v. State*, 216 Miss. 895, 63 So. 2d 396 (1953).

Search of defendant's parked automobile and seizure of quantity of whisky found therein were unlawful where such search and seizure took place after officers, armed with warrant to search defendant's premises for stolen money and other chattels, failed to find anything, there being no evidence or information that the automobile was used for the transportation of liquor; and order of sale of such automobile pursuant to Code 1942, § 2618, constituted reversible error. *Brooks v. Wynn*, 209 Miss. 156, 46 So. 2d 97 (1950).

It is not necessary that an automobile must be actually moving when intercepted on the highway in order to authorize a search under this section [Code 1942, § 2615]; it may be searched on probable cause for so doing if it is driven off the traveled portion of the highway for any purpose while the same is en route to the place to which the intoxicating liquors are being transported and when its continuous travel along the highway has been temporarily interrupted, whether the automobile is at the time actually on the

highway or has departed therefrom to avoid a search, or for some other temporary purpose. *Boyd v. State*, 206 Miss. 573, 40 So. 2d 303 (1949).

This section [Code 1942, § 2615] does not authorize an officer to invade the private premises of a defendant without a search warrant and search an automobile in his garage after the same has come to rest at the completion of the journey during which intoxicating liquors had been unlawfully transported. *Boyd v. State*, 206 Miss. 573, 40 So. 2d 303 (1949).

Provisions for search and seizure are construed strictly against the state. *Adams v. State*, 202 Miss. 68, 30 So. 2d 593 (1947).

The right to make a search for intoxicating liquors on probable cause and without a search warrant is applicable only to the search of an automobile and the other means of transportation mentioned in the statute. *Martin v. State*, 190 Miss. 898, 2 So. 2d 143 (1941); *Harris v. State*, 209 Miss. 183, 46 So. 2d 194 (1950).

Accordingly, where police officer, suspecting illegal sale of beer in the back room of a restaurant, upon being refused admittance thereto, took up his position on the back porch, not for the purpose of making an arrest, but for the purpose of ascertaining whether a misdemeanor would be committed in his presence, such officer was a trespasser and information as to the illegal sale of beer gained there was illegally obtained and was inadmissible in evidence. *Martin v. State*, 190 Miss. 898, 2 So. 2d 143 (1941).

Instruction that officers making joint search without warrant were each liable for acts of other held not erroneous. *Sellers v. Lofton*, 149 Miss. 849, 116 So. 104 (1928).

## **2. Probable cause; reasonableness of search.**

Even though the movement violated no law with reference to intoxicating liquor until the defendant transported it into a dry county, there was probable cause to make a search of his truck without a warrant, where police officers observed the defendant loading whiskey into his pick-up truck at a liquor store and continued their surveillance of the vehicle until an enforcement agent of the alcohol bev-

erage control board took over and followed the vehicle across the county line where he stopped the truck and observed whiskey cases in open view. *State v. Thrash*, 257 So. 2d 523 (Miss. 1972).

The information upon which an arresting officer basès his belief that an automobile is being used for the transportation of intoxicating liquor must be of such nature that it would authorize a judicial finding that a search warrant could be issued if the same had been applied for upon affidavit of the officer. *Stafford v. State*, 193 So. 2d 119 (Miss. 1966).

Information given to a county attorney that something was going on down at a cafe and that a 1959 automobile was supposed to be involved in illegal traffic cannot justify his stopping a 1956 automobile, and, upon observing intoxicating liquor therein, arresting the driver. *Stafford v. State*, 193 So. 2d 119 (Miss. 1966).

Where a defendant is arrested for the possession of intoxicating liquors transported by him, following a search and seizure without a warrant, his counsel is entitled to know who gave the information that he would be transporting the liquors in a particular automobile at a particular place and time, together with a full disclosure of all of the facts upon which the officer acted, in order that the issue may be presented of whether there was probable cause. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

Information obtained from an anonymous telephone informer that the defendant would be transporting whisky in a certain automobile at a certain place and time does not constitute probable cause for the search of the defendant's automobile and the seizure of liquor found there. *Terry v. State*, 252 Miss. 479, 173 So. 2d 889 (1965).

Where an officer's primary purpose in stopping a motorist was not to inspect his license but to search the vehicle without a warrant, and there was no probable cause to arrest the motorist and no misdemeanor was being committed in the officer's presence, and after motorist had been detained three hours his car was searched revealing the presence of intoxicating liquors, the search was unlawful and would not support a conviction. *Coston v. State*, 252 Miss. 257, 172 So. 2d 764 (1965).



The uncorroborated statement of an officer that he had probable cause for searching a vehicle is insufficient to establish the fact. *Barnes v. State*, 249 Miss. 482, 162 So. 2d 865 (1964).

Search and seizure of a motor vehicle may be made without a warrant if the information upon which the seizing officer acts is given him by a credible person. *State, ex rel. Kemper County v. Brown*, 219 Miss. 383, 68 So. 2d 419 (1953).

In a proceeding to confiscate and sell automobile on the ground that the automobile was being used for transportation of whisky, the testimony of the sheriff that the person who gave him the information was not a credible person justified the trial court's conclusion that the sheriff did not have probable cause for seizing and searching the automobile without a warrant and the evidence obtained was not admissible. *State, ex rel. Kemper County v. Brown*, 219 Miss. 383, 68 So. 2d 419 (1953).

A highway patrolman who began his pursuit of a motorist at a time when he had no reason to believe that the motorist had violated any law was not authorized either to begin the chase or to search the automobile for intoxicating liquors without a search warrant. *Gause v. State*, 203 Miss. 377, 34 So. 2d 729 (1948).

Where highway patrolman pursued motorist to check his driver's license, stopped latter's automobile, and thereafter searched it without a warrant and without reason to believe that motorist had violated any laws, and motorist had committed no misdemeanor in the patrolman's presence, evidence that patrolman found whiskey in the automobile was illegally obtained and therefore inadmissible in a prosecution for unlawful possession of intoxicating liquor. *Gause v. State*, 203 Miss. 377, 34 So. 2d 729 (1948).

Owner of automobile in which liquor was discovered was entitled to have sheriff disclose information claimed to authorize search without warrant. *Perry v. State*, 154 Miss. 212, 122 So. 398 (1929).

Excluding testimony of witness denying having given information to sheriff to justify search of automobile without warrant held erroneous. *Perry v. State*, 154 Miss. 212, 122 So. 398 (1929).

That officer not disclosing informants' names was informed defendant was handling whisky did not show probable cause for search without warrant. *Ford v. City of Jackson*, 153 Miss. 616, 121 So. 278 (1929).

That defendant threw whisky out of automobile, when officers were pursuing him to search automobile, did not justify search without warrant. *Ford v. City of Jackson*, 153 Miss. 616, 121 So. 278 (1929).

Town marshal, smelling whisky on breath of occupant of automobile and seeing whisky in car, had probable cause for search without warrant. *Arnold v. State*, 153 Miss. 299, 120 So. 731 (1929).

Officer searching vehicle for liquor without warrant must reveal name of informant as bearing on probable cause. *Hill v. State*, 151 Miss. 518, 118 So. 539 (1928).

A case holding no probable cause for search without warrant. *King v. State*, 151 Miss. 580, 118 So. 413 (1928).

Refusal to require sheriff to give source of information on which he based alleged probable cause for searching defendant's automobile without warrant held error. *Perry v. State*, 150 Miss. 293, 116 So. 430 (1928).

Officer making search without warrant must before search is begun have reason to believe, and must believe, law was being violated. *Sellers v. Lofton*, 149 Miss. 849, 116 So. 104 (1928).

Officers' search of automobile for intoxicating liquor without warrant on ground occupants were driving late and laughing and talking loud held without probable cause. *Sellers v. Lofton*, 149 Miss. 849, 116 So. 104 (1928).

Search of vehicle without warrant is lawful in case of probable cause or belief that liquor is being transported. *Hamilton v. State*, 149 Miss. 251, 115 So. 427 (1928).

"Probable cause" authorizing search of vehicle for liquor without warrant must constitute more than mere belief on part of officer. *Hamilton v. State*, 149 Miss. 251, 115 So. 427 (1928).

Discovery that some one in car had drunk liquors held not probable cause, authorizing its search. *Chrestman v. State*, 148 Miss. 673, 114 So. 748 (1927).

Information given 90 days before, held not reason to believe liquor in car and so

to justify search without warrant. *Gardner v. State*, 145 Miss. 210, 110 So. 588 (1926).

Officer undertaking to search automobile without warrant is not final judge of probable cause or sufficiency of information on which he acts; whether officer searching automobile without warrant has probable cause or sufficient information is question for decision of court, when evidence so obtained is offered at trial; facts on which officer searching automobile without warrant acts must be sufficient in law to constitute probable cause. *McNutt v. State*, 143 Miss. 347, 108 So. 721 (1926).

Person replying to question, before arrest or search, that kegs in automobile

contained whisky, may be arrested without warrant; officer arresting automobilist, who replied, before arrest or search that he had whisky in kegs in automobile, may seize intoxicating liquor without warrant. *Williamson v. State*, 140 Miss. 841, 105 So. 479 (1925).

Search of automobile or boat for intoxicating liquor without warrant is not unreasonable. *Moore v. State*, 138 Miss. 116, 103 So. 483 (1925).

Belief, based on information by credible person, that intoxicating liquor is being transported in automobile, is sufficient to justify search without warrant. *Moore v. State*, 138 Miss. 116, 103 So. 483 (1925).

### RESEARCH REFERENCES

**ALR.** What amounts to violation of drunken-driving statute in officer's "presence" or "view" so as to permit warrantless arrest. 74 A.L.R.3d 1138.

Search and seizure: what constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable—modern cases. 40 A.L.R.4th 381.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

Admissibility of evidence discovered in

search of adult defendant's property or residence authorized by defendant's minor child—state cases. 51 A.L.R.5th 425.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 A.L.R. Fed. 331.

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 443, 448 et seq.

18 Am. Jur. Proof of Facts 2d 681, Third Party's Lack of Authority to Consent to Search of Premises or Effects.

### § 99-27-23. Clubs, boats, places where liquor found may be abated as nuisance.

Any club, vessel or boat, place or room where liquors are found, kept or possessed on any boat or vessel used in any of the waters of this state in conveying any intoxicating liquors or any person with intoxicating liquor in their possession or under their control into or in this state shall be deemed to be a common nuisance and may be abated by writ of injunction issued out of a court of equity upon a bill filed in the name of the state by the attorney general or any district or county attorney whose duty requires him to prosecute criminal cases on behalf of the state, in the county where the nuisance is maintained, or by any citizen or citizens of such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and the practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure hereunder. Upon the abatement of any such place as a nuisance the person found to be the possessor

or owner of such liquor may be required by the court to enter into a good and sufficient bond in such amount as may be deemed proper by the court, to be conditioned that the obligor therein will not violate any of the prohibition laws of the State of Mississippi for a period not to exceed two years from the date thereof. The failure to make such bond shall be a contempt of court and for such contempt the person or party shall be confined in the county jail until such bond is made, but not longer than two years. Said bond shall be approved by the clerk of the court where the proceedings were had and shall be filed as a part of the record of such case.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 2163h; Laws, 1930, § 2007; Laws, 1942, § 2646; Laws, 1918, ch. 189; Laws, 1938, ch. 349.

**Cross References** — Attorney general generally, see §§ 7-5-1 et seq.

Duties of district attorney generally, see § 25-31-11.

Clubs, boats, and the like, operating gambling establishments as nuisances, see § 95-3-25.

Clubs not being permitted to have any interest in gaming, see § 97-33-11.

## JUDICIAL DECISIONS

1. In general.
2. Validity.
3. Parties.
4. Use of property for legitimate purposes.
5. Evidence.
6. Self-incrimination.
7. Temporary injunction.
8. Decrees.
9. Contempt proceedings.
10. Limitation of actions.

### 1. In general.

Purpose of this section [Code 1942, § 2646], providing that a place which is a common nuisance may be abated by an injunction, can only be accomplished by an injunction against the person or persons, who may be ascertained and adjudged to be responsible for that nuisance but the injunction does not issue to suppress a business as such. *Vermillion v. State ex rel. Carman*, 210 Miss. 255, 49 So. 2d 401 (1950).

Since preparations containing alcohol in large quantities, which are sold for beverage purposes, constitute "vinous or spiritous liquors," a suit to recover for the sale of intoxicating liquor, particularly alcohol for beverage purposes, and to suppress the place of business as a nuisance would more properly be brought under the

sections of the statute particularly relating thereto, than under a section authorizing the bringing of a suit to abate by injunction a place where liquor was alleged to have been sold. *State ex rel. v. Carr*, 191 Miss. 659, 4 So. 2d 237 (1941).

This statute is not in pari materia with Code 1930, § 2875 [Code 1942, § 1067] vesting the chancery court with power to abate prostitution and similar nuisances, and to prohibit use of real property for any purpose whatever for one year. *Pigford v. State ex rel. Broach*, 184 Miss. 194, 183 So. 259 (1938).

### 2. Validity.

The statutes which give the state a power to enjoin operation of gaming devices and also give the state power to abate by injunction the sale of liquor are not invalid and unconstitutional because they constitute an attempt to confer upon the chancery court criminal jurisdiction. *Brooks v. State ex rel. Alexander*, 219 Miss. 262, 68 So. 2d 461 (1953).

Statutes which give the state power to enjoin the operation of gaming devices and which also give the state power to abate by injunction the sale of liquor, are not unconstitutional because they deny due process of law in that the defendants are denied the right of trial by jury.



Brooks v. State ex rel. Alexander, 219 Miss. 262, 68 So. 2d 461 (1953).

This statute is a constitutional exercise of legislative prerogative, at least insofar as authorizes the abatement of any place as a nuisance and the issuance of injunction against its maintenance. Murphy v. State, 202 Miss. 890, 32 So. 2d 875 (1947), error overruled, 202 Miss. 895, 33 So. 2d 786 (1948).

### 3. Parties.

That county officers profess ability to control the liquor situation does not render it improper to hear petitions for abatement of alleged liquor nuisances. State ex rel. Dist. Att'y v. Eady, 246 Miss. 694, 151 So. 2d 917 (1963).

It is not enough under this section [Code 1942, § 2646] that the nuisance therein defined be found and adjudged to exist, the identity of the person or persons responsible for the nuisance must also be ascertained and adjudicated and to the end, as the statute provides, that the nuisance so found to exist may be abated by a writ of injunction against the party or parties responsible therefor. Vermillion v. State ex rel. Carman, 210 Miss. 255, 49 So. 2d 401 (1950).

A district attorney was not authorized to bring suit to recover the tax imposed for selling intoxicating liquors for beverage purposes or a suit to suppress as a nuisance a place of business at which alcohol was alleged to have been kept and sold for such purposes, although he would be authorized to sue in proper cases to abate by injunction as a common nuisance a place where intoxicating liquors were found, kept, or possessed. The action should have been brought by the state tax collector, or any sheriff or taxpayer of the county. State ex rel. v. Carr, 191 Miss. 659, 4 So. 2d 237 (1941).

The state tax collector is not authorized to bring suit under this section [Code 1942, § 2646]. Sullivan v. Gully, 187 Miss. 134, 192 So. 568 (1940).

A joint suit in equity by the state tax collector and a county district attorney to collect monetary penalties for the sale of intoxicating liquors at defendant's place of business and to abate such place as a nuisance was improper as constituting a misjoinder of parties and of causes of

action; and the court below erred in not entering an order in response to a special demurrer and a separate bill, but without a new contest, should be filed by the state tax collector. Sullivan v. Gully, 187 Miss. 134, 192 So. 568 (1940).

Under this section [Code 1942, § 2646] the state tax collector is by necessary inference excluded from bringing an action to abate as a common nuisance a place where intoxicating liquors are kept or possessed. Malouf v. Gully, 187 Miss. 331, 192 So. 2 (1939).

This section [Code 1942, § 2646] expressly authorizes institution of proceedings for abatement of a nuisance by private citizens. Caravella v. State ex rel. Holcomb, 185 Miss. 1, 186 So. 653 (1939).

### 4. Use of property for legitimate purposes.

Temporary injunction against liquor nuisance was not void because premises described consisted of 50 acres of land through which a highway ran. Smith v. State ex rel. Weathersby, 245 Miss. 418, 146 So. 2d 73 (1962).

In a padlock proceeding where it appeared that the defendants could have conducted an illegal liquor business in the building as outside the building, the chancellor was not justified in padlocking the building and depriving defendant of the use thereof for legitimate purposes. Whittington v. State ex rel. Barlow, 222 Miss. 94, 75 So. 2d 272 (1954).

In an action under this section [Code 1942, § 2646] to abate as a common nuisance a garage in which intoxicating liquors were allegedly kept, where defendant testified that he carried on automobile repair work on the premises and sold gasoline and automobile accessories, it was error for the trial court to find that the defendant was not conducting a lawful business on the premises and also it was error to close the garage as a common nuisance. Newman v. State ex rel. Barlow, 221 Miss. 331, 72 So. 2d 700 (1954).

While proof that intoxicating liquors were concealed in a secret cache in defendants' house warrants abatement of defendants' business of unlawfully keeping for sale and selling intoxicating liquors, the decree in depriving the owners of the

structure of the use thereof for lawful purposes for the space of a year was beyond the power of the chancery court and should be modified to permit the owner to use the building for legitimate purposes. *Pigford v. State ex rel. Broach*, 184 Miss. 194, 183 So. 259 (1938).

### 5. Evidence.

Only a preponderance of evidence is required in a suit to abate a liquor nuisance. *Thornhill v. State*, 234 Miss. 48, 105 So. 2d 161 (1958); *Turnage v. State*, 234 Miss. 68, 105 So. 2d 483 (1958).

Evidence of use of the property to violate liquor laws subsequently to filing of the complaint, and of the reputation of defendants and property with respect to liquor law violations, is admissible. *Lee v. State*, 234 Miss. 21, 105 So. 2d 346 (1958).

In a suit to enjoin the defendant against having possession of any intoxicating liquor on the premises which he was operating as a grocery store, wherein it was alleged that the defendant had entered a plea of guilty to illegal possession of intoxicating liquor and paid a fine therefor, testimony of other alleged instances thereafter of intoxicating liquors being possessed or sold off the premises should have been excluded as incompetent, upon objection. *Everett v. State ex rel. Johnson*, 232 Miss. 816, 100 So. 2d 583 (1958).

Evidence that, although defendant's grocery business had been raided by police officers as many as thirty times, the only instances of finding intoxicating liquor thereon was when the officers found one can of beer in the defendant's icebox, and on another occasion when they found two pints of whisky in a pocket of a coat belonging to the defendant was not sufficient to support a finding that the defendant was actually maintaining a common nuisance at his place of business. *Everett v. State ex rel. Johnson*, 232 Miss. 816, 100 So. 2d 583 (1958).

A decree abating the nuisances of selling intoxicating liquor and carrying on gambling on certain premises, and providing for the condemnation and sale of personal property used in connection with the operation of such nuisances, was not erroneous because the court decided the case on final hearing on proof submitted on the hearing for a temporary injunction alone

where there was no request on the part of the appellants that they might present any additional evidence or demand for a further hearing with the showing that other and additional evidence was desired to be offered. *Caravella v. State ex rel. Holcomb*, 185 Miss. 1, 186 So. 653 (1939).

Evidence procured under search warrant issued by justice of peace and executed by officer of militia held admissible in prosecution to abate liquor nuisance. *State v. McPhail*, 182 Miss. 360, 180 So. 387 (1938).

In proceeding to abate a liquor nuisance, evidence of reputation of defendant's place of business as place where liquor was stored and sold was admissible, where it was shown that defendant was in possession of liquor at one time when search was made and pleaded guilty to liquor charge, that liquor was found near building on subsequent searches, and that defendant was convicted of having possession thereof and paid fine. *State ex rel. Dist. Att'y v. Ingram*, 179 Miss. 485, 176 So. 392 (1937).

In proceeding to abate liquor nuisance, it is not necessary to show that liquor was found in building, where proof shows that liquor law was being violated at place in question, that liquor was kept accessible to such place, and that place was generally regarded as place where liquor could be had. *State ex rel. Dist. Att'y v. Ingram*, 179 Miss. 485, 176 So. 392 (1937).

In proceeding to abate liquor nuisance, evidence liquor was sold and prostitution carried on at defendant's place held to show that defendant's place constituted a nuisance subject to abatement. *State ex rel. Dist. Att'y v. Ingram*, 179 Miss. 485, 176 So. 392 (1937).

In proceeding by state, on the relation of district attorney, to abate liquor nuisance, evidence that defendant's place of business had general reputation of being one where intoxicating liquors were kept for use and sale held competent, where it was secondary and supplementary. *State ex rel. Dist. Att'y v. White*, 178 Miss. 542, 173 So. 456 (1937).

Proceeding by state, on the relation of district attorney, to abate liquor being a civil cause, defendant could have taken depositions of any witnesses outside state



who would support defendant's testimony. *State ex rel. Dist. Att'y v. White*, 178 Miss. 542, 173 So. 456 (1937).

In proceeding to abate liquor nuisance, decree dismissing bill on ground that evidence was insufficient to sustain it held against great preponderance of evidence. *State ex rel. Dist. Att'y v. White*, 178 Miss. 542, 173 So. 456 (1937).

### 6. Self-incrimination.

In a suit in chancery on relation of district attorney to enjoin defendants from selling intoxicating liquor, where defendants were called in as adverse witnesses for cross-examination and compelled to testify that they have unlawfully sold liquor, the bill of complaint will be dismissed on the ground that the defendants were compelled to testify against themselves, and they were granted immunity from further prosecution. *Zambroni v. State ex rel. Hawkins*, 217 Miss. 418, 64 So. 2d 335 (1953).

Defendant who, by his testimony, admitted the sale of intoxicating liquor in connection with his mercantile business, could not be prosecuted under this section [Code 1942, § 2646], in view of the statute providing that no person shall be prosecuted or subject to penalty for forfeiture for or on account of any transaction, matter of thing, concerning which he may testify, or produce evidence before the grand jury or any court, since by his confession of guilt defendant subjected himself to the forfeiture of both his liquor business and his mercantile business, as against the contention that the court merely enjoined the further prosecution in the business and imposed no penalty or forfeiture. *Malouf v. Gully*, 187 Miss. 331, 192 So. 2 (1939).

### 7. Temporary injunction.

Temporary injunction against liquor nuisance was not void because premises described consisted of 50 acres of land through which a highway ran. *Smith v. State ex rel. Weathersby*, 245 Miss. 418, 146 So. 2d 73 (1962).

The basis of invoking equitable jurisdiction under this section [Code 1942, § 2646] is the existence of a common nuisance brought about by facts specifically alleged in regard to violation of crim-

inal laws by keeping, storing and selling intoxicating liquors in violation of the law on the premises which are alleged to constitute the common nuisance and the court may grant a temporary injunction without notice and the fact that this section then contemplates that the owner may be required by the court to enter into a bond to the condition that the obligor therein would not violate any of the prohibition laws. *State ex rel. Hawkins v. Busby*, 224 Miss. 181, 79 So. 2d 728 (1955).

Where a bill of complaint for an injunction was filed in the chancery court and the chancery court issued a temporary injunction without notice enjoining defendant from conducting unlawful business in violation of intoxicating liquor laws, the chancellor did not intend to abate the place of business as a common nuisance without notice to the defendant operator of such place of business, prior to a final hearing on the bill of complaint, and the purpose of the temporary injunction was to restrain the sale of intoxicating liquors at place of business sought to be abated pending the hearing of a bill of complaint in that behalf. *State ex rel. Hawkins v. Busby*, 224 Miss. 181, 79 So. 2d 728 (1955).

The rules applicable to injunctions generally are applicable to injunctions issued under liquor statutes and a temporary injunction can operate only until the conclusion of the trial. *Rochelle v. State*, 222 Miss. 83, 75 So. 2d 268 (1954).

Where a temporary writ of injunction was issued in a suit to have the premises of the defendant where liquors and slot machines were kept and exhibited, the writ of injunction was not void, neither was it erroneously nor improvidently granted and the defendant had to obey injunction. *McBride v. State*, 221 Miss. 508, 73 So. 2d 154 (1954).

### 8. Decrees.

In no event should an injunction undertake to prohibit the possession or sale of intoxicating liquors at places other than the premises which were abated as a nuisance. *Everett v. State ex rel. Johnson*, 232 Miss. 816, 100 So. 2d 583 (1958).

Since the statute did not give to the chancery court power to enjoin a defen-



dant from violating the liquor and gambling laws anywhere in the state, other than on the premises found to be a common nuisance, an injunction, which undertook to prohibit defendant from having intoxicating liquors and gambling devices in his possession at places other than the place ordered to be abated as a nuisance, was invalid. *Horne v. State*, 232 Miss. 252, 98 So. 2d 653 (1957).

Since a decree enjoining defendant, one of the owners of certain premises abated as a common nuisance, from permanently having intoxicating liquors in his possession or control throughout the territorial limits of the county and the entire state, was not authorized by this section [Code 1942, § 2646], defendant, who was arrested several miles from the vicinity of the abated premises while in possession of intoxicating liquors was improperly adjudged in contempt of court. *Warren v. State*, 231 Miss. 343, 95 So. 2d 237 (1957).

A decree directing the issuance of an injunction against a place as a common nuisance is in personam against the person or persons against whom the same is rendered and operates in rem against the particular premises insofar as concerns the illegal use of such premises. *Vermilion v. State ex rel. Carman*, 210 Miss. 255, 49 So. 2d 401 (1950).

While the court can, under this section [Code 1942, § 2646], abate and enjoin the prosecution of a business adjudged to be a common nuisance, such as selling of liquor and gambling, and require offenders to execute a bond to comply with the decree, the court is without power to order the padlocking of the buildings, where defendants have executed the compliance bond. *Foreman v. State ex rel. District Att'y*, 209 Miss. 331, 46 So. 2d 794 (1950).

This section [Code 1942, § 2646], and Laws 1938, Chap. 341 [Code 1942, § 1073], and Code 1930, § 1979 [Code 1942, § 2618], authorized and warranted proceedings to abate nuisances of selling intoxicating liquors and carrying on gambling on certain premises, and a decree perpetually enjoining the defendant from operating such nuisances and providing for the condemnation and sale of all personal property used in connection therewith, where the lawful use of the real

estate involved was not interfered with, is permissible. *Caravella v. State ex rel. Holcomb*, 185 Miss. 1, 186 So. 653 (1939).

### 9. Contempt proceedings.

Violation of an injunction issued under this section [Code 1942, § 2646] may be punished as contempt notwithstanding such violation is a penal offense for which the contemnor has been punished. *Church v. State ex rel. District Att'y*, 239 Miss. 1, 111 So. 2d 228 (1959).

Since the statute did not give to the chancery court power to enjoin a defendant from violating the liquor and gambling laws anywhere in the state, other than on the premises found to be a common nuisance, an injunction which undertook to prohibit the defendant from having intoxicating liquors and gambling devices in his possession at places, other than the place ordered to be abated as a nuisance, was invalid, so that a defendant, charged with violating the invalid portion of the injunction, was improperly found to be in contempt of court. *Horne v. State*, 232 Miss. 252, 98 So. 2d 653 (1957).

Since an injunction enjoining defendant, one of the owners of certain premises abated as a common nuisance, from permanently having unlawful possession or control of intoxicating liquor throughout the territorial limits of the county and the entire state, was not authorized by this section [Code 1942, § 2646], the defendant, who was arrested several miles from the vicinity of the premises abated as a nuisance while in possession of intoxicating liquors was improperly adjudged in contempt of court. *Warren v. State*, 231 Miss. 343, 95 So. 2d 237 (1957).

In a contempt action for violation of injunction against possession and sale of intoxicating liquor on described premises, the mere smelling of what officers believed to be the odor of whisky without cooperation of any kind was insufficient evidence to sustain adjudication of contempt. *Little v. State*, 223 Miss. 424, 78 So. 2d 578 (1955).

Where an injunction prohibited defendant from selling intoxicating liquors on certain described premises and there was evidence that defendant did sell intoxicating liquor on a separate tract of land in adjoining premises, the evidence did not

sustain conviction of defendant for contempt of court for violating the injunction decree. *Rochelle v. State*, 222 Miss. 83, 75 So. 2d 268 (1954).

This section [Code 1942, § 2646] may appropriately be taken in connection with Code 1942, § 1278, which is declaratory of the power of the chancery court or chancellor in vacation to punish any person for violation of an injunction as for a contempt. *Murphy v. State*, 202 Miss. 890, 32 So. 2d 875 (1947), error overruled, 202 Miss. 895, 33 So. 2d 786 (1948).

Testimony establishing that defendant was found in possession of a substantial quantity of whisky which he was seen to hide about a foot and a half outside the fence which enclosed his home place and that he told the officers who made the search that he was in the "general bootlegging" business, justified a finding of violation of the chancellor's prior injunction order warranting punishment as for contempt. *Murphy v. State*, 202 Miss. 890, 32 So. 2d 875 (1947), error overruled, 202 Miss. 895, 33 So. 2d 786 (1948).

Decree in contempt proceedings for violation of an injunction order reciting that defendant wilfully, unlawfully and in violation of the court's order had in his possession intoxicating liquors was not objectionable as a conviction of defendant for a general violation of the law rather than as regards the nuisance feature of the injunction, even if the court's opinion, made a part of the record, had not recited that the court found from the evidence that whisky was found near the premises of the defendant and was in his possession, since the chancellor was acting upon the entire record before him. *Murphy v. State*, 202 Miss. 890, 32 So. 2d 875 (1947), error overruled, 202 Miss. 895, 33 So. 2d 786 (1948).

The presumption is that in this section [Code 1942, § 2646] the legislature employed the words "contempt" in contemplation of the element of ability or disability

to comply. *Hansbrough v. State*, 193 Miss. 461, 10 So. 2d 170 (1942); *White v. State*, 193 Miss. 467, 10 So. 2d 171 (1942).

A defendant should not be imprisoned for contempt for failure to furnish the bond ordered by the court, conditioned upon the defendant's not violating any of the prohibition laws, where such failure was due, not to his wilful disobedience of the order of the court, but to his inability to procure the necessary securities on his bond. *Hansbrough v. State*, 193 Miss. 461, 10 So. 2d 170 (1942); *White v. State*, 193 Miss. 467, 10 So. 2d 171 (1942).

### 10. Limitation of actions.

In determining whether a person cited for contempt has the right to a jury trial, which determination must be based on whether the contempt is to be treated as a serious or a petty offense, the court must look to the maximum sentence which could be imposed under the statute if a maximum penalty has been set, and if no maximum penalty has been set, the court should look to the penalty actually imposed as the best evidence of the seriousness of the offense. *McGowan v. State*, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

A defendant who, in a trial without a jury was found guilty of contempt for violating an injunction prohibiting him from conducting the unlawful business of keeping and selling intoxicating liquor on certain premises, and was sentenced to 5 months imprisonment and a fine of \$750, was not entitled to a jury trial, but was entitled to have his fine reduced to \$500. *McGowan v. State*, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

The two-year limitation in the statute covers only the extent of liability under the bond and begins when the bond is executed and approved. *Weems v. State*, 210 Miss. 824, 50 So. 2d 398 (1951).

## RESEARCH REFERENCES

**ALR.** Admissibility, in prosecution for maintaining liquor nuisance, of evidence of general reputation of premises. 68 A.L.R.2d 1300.

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 396 et seq.

14A Am. Jur. Pl & Pr Forms (Rev), Intoxicating Liquors, Forms 112, 113

(complaint, petition, or declaration to abate and enjoin saloon as nuisance); Form 136 (judgment or decree abating nuisance and enjoining defendant).

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 598 et seq.

**Law Reviews.** Rychlak, Common-Law remedies for environmental wrongs: The role of private nuisance. 59 Miss. L. J. 657, Winter, 1989.

### § 99-27-25. Club to forfeit charter; boat may be sold.

Any chartered club or incorporated association of persons under the laws of Mississippi that is guilty of violating any of the provisions of Chapter 31 of Title 97, Mississippi Code of 1972 or this chapter or maintains or keeps any such place as hereinabove described, shall forfeit its charter, and such forfeiture may be declared by a proceeding in quo warranto or other appropriate action against the club or incorporated association in a court of competent jurisdiction in the county where the unlawful act is committed. Any boat or vessel that is guilty of violating any of the provisions of this section, adjudged or decreed to be a nuisance may also be ordered to be sold, as directed by the court and the proceeds after paying costs, paid into the general fund of the county treasury.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 2163i; Laws, 1930, § 2008; Laws, 1942, § 2647; Laws, 1918, ch. 189.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The word "proceedings" was changed to "proceeding". The Joint Committee ratified the correction at its December 3, 1996 meeting.

**Cross References** — Quo warranto proceedings generally, see §§ 11-39-1 et seq.

### § 99-27-27. Common carriers, etc., required to produce books for examination.

In the prosecutions of violations of Chapter 31 of Title 97, Mississippi Code of 1972, or this chapter any common carrier, or any other person or transportation agency doing business in the State of Mississippi shall be required to produce any books, documents, or records in its possession or under its control throwing any light upon such prosecution, when commanded by process issued under the authority of this state and shall be required to permit an examination to be made of such by an officer of the state, whose duty it is to prosecute crime, where such information is sought in the aid of any criminal prosecution, or as the means to ferret out criminals or persons charged with or suspected of crime.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 2163j; Laws, 1930, § 2009; Laws, 1942, § 2648; Laws, 1918, ch. 189.

**Cross References** — Transportation of wine and beer by common carriers, see § 67-3-61.



**§ 99-27-29. Common carriers, etc. to keep record of alcohol and wine deliveries; inspection by officers; competent evidence at trial.**

It shall be the duty of every railroad company, express company, or other common carrier, and of every person, firm or corporation, that shall transport any of the alcohol or wine mentioned into the state from any points or places for the purpose of delivery and who shall deliver such alcohol or wine, or either of them, to any person, firm or corporation in this state, to currently keep in a fair and legible hand, or typewritten or otherwise, so that same may be easily read, a record of such alcohol or wine, and of the delivery thereof, which shall set forth the dates on which said alcohol or wine were received and delivered, the names and postoffice address of the consignor and consignee, the place of delivery, and the person to whom delivered and the kind and amount of such alcohol or wine delivered. The record hereinabove required to be kept by common carriers, or persons, firms or corporations making the delivery of said alcohol or wine, or either of them, in this state, shall also be open to the inspection (1) of all officers, (2) of the duly authorized persons seeking information for the prosecution of persons charged with or suspected of crime, and when application is made by any of the said officers or persons for permission to examine and take copies of such record, they shall be allowed to do so during office or business hours, of the persons or corporations keeping such records, and in such reasonable manner as not to interfere with the business of the corporation or person keeping said record. The said record may be secured to be produced in court by any lawful process, issued by any court in this state to be used as evidence, and said record shall be competent evidence upon the trial of any causes whatsoever in any of the said courts, in which the record may be material or relevant to the issues involved.

**SOURCES:** Codes, Hemingway's 1921 Supp. § 2163r; Laws, 1930, § 2018; Laws, 1942, § 2657; Laws, 1918, ch. 189.

**Cross References** — Transportation of wine and beer by common carriers, see § 67-3-61.

### JUDICIAL DECISIONS

**1. In general.**

May-Mott-Lewis Act 1914, ch. 127 § 5, requiring carriers of liquor into state to keep a record thereof, is not invalid as

burden on interstate commerce. *American Express Co. v. Beer*, 107 Miss. 528, 65 So. 575, Am. Ann. Cas. 1916D,127 (1914).

### RESEARCH REFERENCES

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors § 51.

**§ 99-27-31. Common carriers, etc. to file statement of deliveries with circuit clerk; procedure to compel compliance.**

It shall be the duty of every railroad company, express company, or other carrier, and of every person, firm or corporation, that shall transport any of the alcohol or wine authorized, and who shall deliver such alcohol or wine or either of them in this state, to file with the clerk of the circuit court of the county in which said alcohol or wine is delivered, a statement, either printed or plainly written, or typewritten on stout paper, correctly stating the date on which the alcohol or wine was delivered, the name and postoffice address of the consignee and consignor, the place of delivery, and to whom delivered, and the kind and amount of such liquors delivered, such statement to be filed within three days after the date of delivery of such liquor. If said statement is in writing, it shall be in a fair and legible hand, and the names of the consignee and the consignor and of the party who obtained delivery shall be truly ascertained and furnished in such way as to avoid mistakes in names. If any person, firm or corporation making delivery shall neglect to file with the circuit clerk such statement or statements, then it shall be the duty of the circuit clerk to make written demand upon such person, firm or corporation, to comply with the requirements of this section, such demand to be served by the sheriff and return made by him to the circuit clerk upon a copy of the original demand. Upon further refusal or noncompliance, it shall be the duty of the circuit clerk to promptly inform the attorney-general of the state of such failure or refusal, and it shall then be the duty of the attorney-general, either himself to file, or to direct and secure some district attorney or county attorney whose duty it is to prosecute crime in the county, to file a suit in the name of the state.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 2163p; Laws, 1930, § 2016; Laws, 1942, § 2655; Laws, 1918, ch. 189.

**Cross References** — Attorney general generally, see §§ 7-5-1 et seq.

Clerk of circuit court generally, see §§ 9-7-121 et seq.

Duties of district attorney generally, see § 25-31-11.

Reports of motor carriers generally, see § 77-7-261.

Transportation of wine and beer by common carriers, see § 67-3-61.

**RESEARCH REFERENCES**

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors § 51.

**§ 99-27-33. Circuit clerk to file and record statement; inspection by officers; competent evidence at trial; grand jury to investigate compliance.**

It shall be the duty of the circuit clerk to immediately file the statement required by Section 99-27-31, as a part of the records in his office, and to preserve such statement, or statements, for a period of twelve months, after which time they may be destroyed, and (1) permit any sheriff, deputy sheriff,

constable, chief of police, or other police officer of a town or city, or any district or county attorney whose duty it is to prosecute crime in the county in which delivery is made, and any other peace officer of the county to inspect the said statement as they may desire at any time the office of said circuit clerk may be open, and especially to permit inspection thereof by any officer, or other duly authorized person seeking information for the prosecution of persons charged with or suspected of crime; and (2) to permit any and all other persons so desiring to inspect the said statements, to do so at any time the office of the circuit clerk may be open, it shall be the further duty of the circuit clerk to give a certified copy of such statement to any of said officers without charge or to any other person requesting or demanding the same upon the payment of lawful fees therefor and the said original statements or certified copies thereof shall be competent evidence upon the trial of any cause whatever in any of the courts of this state in which same may be relevant or material to the issue or issues involved.

Every grand jury shall appoint a committee of three to examine the records of the circuit clerk and investigate whether this section is being complied with and the circuit judge shall charge the grand jury to this effect.

**SOURCES:** Codes, Hemingway's 1921 Supp., § 2163q; Laws, 1930, § 2017; Laws, 1942, § 2656; Laws, 1918, ch. 189.

**Cross References** — Clerk of circuit court generally, see §§ 9-7-121 et seq.

### **§ 99-27-35. Venue of prosecutions for unlawful shipment.**

In all prosecutions under Chapter 31 of Title 97, Mississippi Code of 1972 and this chapter for unlawful shipments of liquors, bitters, or drinks prohibited by the laws of the state to be sold, bartered or otherwise disposed of in this state, the offense shall be held to have been committed in any county of the state through which or into which said liquors have been carried or transported, or in which they have been unloaded, or in which they have been delivered, or conveyed for delivery; and this applies whether the said liquors, bitters and drinks are shipped into the state from outside of the state, or shipped or transported from one point in the state to any other point in the state. The circuit court held in the county from which, through which, or to which such shipments are made, or in which delivery of any such shipment is made, shall have jurisdiction for the trial of such violations of the chapters and the grand jury of such counties shall be vested with inquisitorial powers over violations of the chapters.

**SOURCES:** Codes, Hemingway's 1921 Supp., § 2163l; Laws, 1930, § 2011; Laws, 1942, § 2650; Laws, 1918, ch. 189.

**Cross References** — Venue in criminal cases generally, see § 99-11-3.



## RESEARCH REFERENCES

**Am Jur.** 45 **Am. Jur.** 2d, Intoxicating Liquors § 301.

**§ 99-27-37. Counties and municipalities may appropriate money to procure evidence of liquor and narcotics violations.**

The board of supervisors of any county in this state and mayor and board of aldermen, or board of aldermen and councilmen, as the case may be, of any municipality in this state are hereby authorized and empowered to appropriate, from time to time, sums of money, not exceeding one-third ( $\frac{1}{3}$ ) of the fines which have been collected by them respectively, from the unlawful sale or possession of intoxicating liquors and/or narcotics and/or other illegal drugs, for the purpose of defraying expenses incurred by law enforcement agencies in the procuring of evidence of violations of statutes or ordinances, as the case may be, against the unlawful sale or keeping of intoxicating liquors and/or narcotics and/or other illegal drugs. For the purpose of this section, the word "expenses" shall include, but not be limited to, expenditures related to surveillance, the purchase of investigative equipment, the purchase of samples to be used as evidence, the purchase of information, and the defraying of living expenses of persons specially employed in investigations.

**SOURCES:** Codes, Hemingway's 1917, § 2124; Laws, 1930, § 2002; Laws, 1942, § 2641; Laws, 1912, ch. 124; Laws, 1970, ch. 347, § 1; Laws, 1986, ch. 327, eff from and after passage (approved March 14, 1986).

## JUDICIAL DECISIONS

**1. In general.**

This section prohibits constables from receiving additional compensation for procuring evidence in intoxicating liquor cases. *Ellington v. State*, 366 So. 2d 1077 (Miss. 1978).

This section [Code 1942, § 2641] is a mere enabling act authorizing board of supervisors to make such appropriations in their discretion, and in amounts less than one-third if thought proper. *Hancock County v. Vairin*, 119 Miss. 315, 80 So. 780 (1919).

Sheriff employing persons to secure evidence of violation of liquor laws, upon the authority of board of supervisors, is entitled to reimbursement for sums paid such persons if the board has agreed to pay such sums and has appropriated funds for that purpose. *Hancock County v. Vairin*, 119 Miss. 315, 80 So. 780 (1919).

County not liable for one-third of fine imposed until the fine has been collected. *Grenada County v. Little*, 111 Miss. 605, 71 So. 871 (1916).

## ATTORNEY GENERAL OPINIONS

If Board of Supervisors of each county involved in narcotics task force approves the appropriation allowed at Section 99-27-37, one third of fines collected by task

force may be returned to task force to defray expenses listed in statute. *Jennings*, Oct. 15, 1992, A.G. Op. #92-0601.

## § 99-27-39. Payment by liquor dealers of penalty to state, county, or municipality.

Any person who may sell or give away malt, vinous or spirituous liquors unlawfully, or who shall allow the same to be sold or given away at his place of business, for any purpose whatever, or shall knowingly permit any person not interested in or connected with such business to keep and drink or give away at such place of business any vinous, malt or spirituous liquors, shall be subject to pay to the state, county, city, town or village, where the offense is committed, each, the sum of five hundred dollars (\$500.00). The state, county, city, town or village, or any taxpayer of the state, county, city, town or village in the name thereof, or the state tax commission, or any tax collector within the county acting for them, may sue for and recover civilly, either jointly or separately, each said sum of five hundred dollars (\$500.00); and such civil suit may be commenced by attachment without bond.

**SOURCES:** Codes, Hemingway's 1917, § 2121; Laws, 1930, § 2000; Laws, 1942, § 2639; Laws, 1910, ch. 134; Laws, 1912, ch. 256; Laws, 1962, ch. 588, § 16, eff from and after Jan. 1, 1964.

**Cross References** — Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

Chancery court to have concurrent jurisdiction with courts of law to entertain suits under this section, see § 99-27-41.

### JUDICIAL DECISIONS

1. In general.
2. Right to trial by jury.
3. Self-incrimination.
4. Who may bring suit.
5. Pleading.
6. Evidence.

#### 1. In general.

The amount of penalties which may be recovered by the state, the county and the municipality for a violation of this statute is not to be determined according to the number of sales which the proof may show the defendant has made; the word "each" in the statute clearly refers to state, county and city, not to the sale. *Winter v. Hardester*, 232 Miss. 200, 98 So. 2d 629, 71 A.L.R.2d 982 (1957).

In an action by a state tax collector to recover statutory penalties due for unlawful sale of intoxicating liquor the fact that the state tax collector, engaged in the collection of black market tax, has not filed similar suits against persons paying that tax, was not a ground that the suit

was discriminatory or that the state tax collector did not come into court with clean hands. *Freeman v. Bailey*, 222 Miss. 904, 77 So. 2d 682 (1955).

The use of strong methods by collector to collect from delinquent taxpayers penalties on sale of intoxicating liquor, is not discrimination against such delinquents where such force is not necessary to secure payment by others. *Bishop v. Bailey*, 209 Miss. 892, 48 So. 2d 588 (1950).

Since preparations containing alcohol in large quantities, which are sold for beverage purposes, constitute "vinous or spirituous liquors," a suit to recover for the sale of intoxicating liquor, particularly alcohol for beverage purposes, and to suppress the place of business as a nuisance would more properly be brought under the sections of statute particularly relating thereto, than under a section authorizing the bringing of a suit to abate by injunction a place where liquor was alleged to have been sold. *State ex rel. v. Carr*, 191 Miss. 659, 4 So. 2d 237 (1941).

The forfeiture provided hereunder is not a debt or obligation within the purview of the business sign statute (Code 1930, § 3352 [Code 1942, § 273]). *International Harvester Co. v. Gully*, 188 Miss. 115, 194 So. 472 (1940); *Malvezzi v. Gully*, 189 Miss. 20, 193 So. 42 (1940), suggestion of error overruled, 189 Miss. 28, 193 So. 926 (1940); *GMAC v. Gully*, 194 So. 473 (Miss. 1940).

Jamaica ginger is "spirituous" or "vinous liquor" within act imposing penalties for sale. *Payne v. State*, 125 Miss. 896, 88 So. 483 (1921).

Sale of malt liquors cannot be enjoined under this section [Code 1942, § 2639]. *Collotta v. State*, 110 Miss. 448, 70 So. 460 (1915).

This provision does not authorize criminal prosecution. *State ex rel. Att'y Gen. v. Marshall*, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

Suit in chancery to recover penalties for illegal sale of liquor is a civil suit. *State ex rel. Att'y Gen. v. Marshall*, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

Complainant suing under this section [Code 1942, § 2639] has right of attachment. *State ex rel. Att'y Gen. v. Marshall*, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

No affidavit necessary for attachment under this section [Code 1942, § 2639]. *State ex rel. Att'y Gen. v. Marshall*, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

## 2. Right to trial by jury.

Statute which provides for recovery of penalty for sale of intoxicating liquor is a civil and not a criminal proceeding and the right to trial by jury of such a matter in the chancery court does not exist. *Bishop v. Bailey*, 209 Miss. 892, 48 So. 2d 588 (1950); *Freeman v. Bailey*, 222 Miss. 904, 77 So. 2d 682 (1955).

## 3. Self-incrimination.

Where defendants in a suit by state tax collector to collect from defendants statutory fines and penalties for unlawful sale of intoxicating liquors, were required to answer allegations in a bill of complaint in chancery and therefore they were required to incriminate themselves, the defendants were immune from assessment of fines and penalties. *Bailey v. Muse*, 227

Miss. 51, 85 So. 2d 918 (1956).

In a suit by the state tax collector to collect from defendant statutory fines and penalties for unlawful sales of intoxicating liquors, where the defendants raised the issue that by answering averments to the bill of complaint they would incriminate themselves and where defendants were compelled by the court to answer the bill fully, the defendants were immune from liability for the fines and penalties although the bill of complaint waived answer under oath. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

Code 1942, § 1291 which provides that a defendant in chancery shall answer fully all of the allegations of the bill, and that all averments of fact not denied by the answer otherwise than by general traverse may be taken at the hearing as admitted, applies to suits for penalties under this section [Code 1942, § 2639] and Code 1942, § 2640. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

Code 1942, § 2630 which provides that no person shall be excused from testifying before a grand jury or any court in any proceeding, criminal or otherwise, on the ground that the testimony may tend to incriminate him or subject him to penalty or forfeiture but providing that person testifying shall be exempt from prosecution or punishment, applies to this section [Code 1942, § 2639] and defendant is made immune from fines and penalties. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

Where one accused of selling intoxicating liquors on his premises in violation of law was called by the state tax collector to testify, he was immune from the consequences of the violation of law and was entitled to be discharged. *Serio v. Gully*, 189 Miss. 558, 198 So. 307 (1940).

One who by his testimony admitted his guilt in selling intoxicating liquors in connection with his drygoods and grocery business was immune from prosecution under this section [Code 1942, § 2639] in view of the statute providing that no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction concerning which he may testify or produce evidence before the grand jury or any court, since his testimony subjected him to penalties and forfeitures, as against the contention that



the court merely enjoined the further prosecution of the business and imposed no penalty or forfeiture. *Malouf v. Gully*, 187 Miss. 331, 192 So. 2 (1939).

#### 4. Who may bring suit.

Although a taxpayer has a right to sue under this section [Code 1942, § 2639] in the capacity of a fiduciary or trustee for the benefit of the county and state, he has no right to compromise or dismiss the suit upon the payment of money to him for his own personal use and to defraud the state and county in obstructing administration of justice in the court. *Melvin v. State*, 210 Miss. 132, 48 So. 2d 856 (1950), error overruled 210 Miss. 132, 49 So. 2d 837.

A district attorney was not authorized to bring suit to recover the tax imposed for selling intoxicating liquors for beverage purposes or a suit to suppress as a nuisance a place of business at which alcohol was alleged to have been kept and sold for such purposes, although he would be authorized to sue in proper cases to abate by injunction as a common nuisance a place where intoxicating liquors were found, kept, or possessed. The action should have been brought by the state tax collector, or any sheriff or taxpayer of the county. *State ex rel. v. Carr*, 191 Miss. 659, 4 So. 2d 237 (1941).

Formerly the state tax collector had the right to bring a suit to collect by attachment the tax imposed against a defendant for unlawfully selling intoxicating liquors at his place of business and for suppression thereof as a nuisance. *Montroy v. Gully*, 189 Miss. 13, 193 So. 40 (1940), suggestion of error overruled, 193 So. 926 (Miss. 1940); *Tuminello v. Gully*, 189 Miss. 28, 193 So. 39 (1940), suggestion of error overruled, 193 So. 925 (Miss. 1940).

The district attorney is not empowered to bring suit under this section [Code 1942, § 2639]. *Sullivan v. Gully*, 187 Miss. 134, 192 So. 568 (1940).

A joint suit in equity by the state tax collector and a county district attorney to collect monetary penalties for the sale of intoxicating liquors at defendant's place of business and to abate such place as a nuisance was improper as constituting a misjoinder of parties and of causes of action; and the court below erred in not entering an order in response to a special

demurrer and a separate bill, but without a new contest, should be filed by the state tax collector. *Sullivan v. Gully*, 187 Miss. 134, 192 So. 568 (1940).

#### 5. Pleading.

Answer of defendant to bill in equity to recover statutory penalty for unlawful possession and sale of whisky at defendant's place of business, denying that he owned a place of business as described in the bill, that he had whisky in his possession at such place, and denying that he sold whisky at such place was insufficient as being a denial of the bill by general traverse, its effect being to admit, at least the fact that defendant owned the business alleged to have been carried on in violation of law. *Noe v. Gully*, 189 Miss. 1, 193 So. 36 (1940), error overruled, 193 So. 927 (Miss. 1940).

#### 6. Evidence.

The presumption that the owner of a place of business has knowledge of the presence of intoxicating liquor, flowing from the sale of intoxicating liquors in his place of business, and its reputation as a place where intoxicating liquors could be, and were, bought, was sufficient to sustain the judgment of the chancery court assessing the statutory penalty and abating the place as a nuisance, where the owner did not testify. *Noe v. Gully*, 189 Miss. 1, 193 So. 36 (1940), suggestion of error overruled, 193 So. 927 (Miss. 1940); *Nause v. Gully*, 193 So. 41 (Miss. 1940), suggestion of error overruled, 193 So. 927 (Miss. 1940); *Assad v. Gully*, 193 So. 42 (Miss. 1940), suggestion of error overruled, 193 So. 925 (Miss. 1940).

In proceedings to recover statutory penalties for the unlawful possession and sale of whisky at defendant's place of business, evidence of the general reputation of such place as being a place where intoxicating liquors can be bought is admissible. *Noe v. Gully*, 189 Miss. 1, 193 So. 36 (1940), suggestion of error overruled, 193 So. 927 (Miss. 1940); *Malvezzi v. Gully*, 189 Miss. 20, 193 So. 42 (1940), suggestion of error overruled, 189 Miss. 28, 193 So. 926 (1940).

Evidence that whisky was sold at defendant's place of business by a Negro helper and employee of defendant, and that place had general reputation as being a place where whisky could be and was bought

and sold sustained decree assessing penalties and suppressing the place as a nuisance. *Montroy v. Gully*, 189 Miss. 13, 193 So. 40 (1940), error overruled, 193 So. 926 (Miss. 1940).

In proceedings in equity to collect by attachment a tax imposed for selling or allowing the sale of intoxicating liquor unlawfully at defendant's place of business and to suppress such place as a nuisance by injunction, the oral testimony offered before the chancellor, together with the fact that defendant gave bond, as principal obligor therein, for the attached property, including the stock of merchandise, sustained the finding of the chancellor defendant owned and operated the place of business, bearing his name or trade sign, at which the witnesses purchased the intoxicating liquor testified about in the case. *Montroy v. Gully*, 189 Miss. 13, 193 So. 40 (1940), error overruled, 193 So. 926 (Miss. 1940).

In a proceeding by the state tax collector to collect by attachment the tax imposed for unlawfully selling intoxicating liquors at defendant's place of business and for the suppression of such place as a nuisance, the filing by defendant of a claim of exemption, under oath, as a resident citizen and householder, claiming as exempt from levy under attachment a large portion of the personal property which, ac-

cording to the officer's return of the writ, was located in the place of business in question and the acknowledgment in such claim of exemption that the remainder thereof had been sold to him under retain title contract, sustains the finding that defendant owned and operated the place of business at which it was claimed intoxicating liquors were sold. *Tuminello v. Gully*, 189 Miss. 28, 193 So. 39 (1940), error overruled, 193 So. 925 (Miss. 1940).

Finding of the chancery court that the person who sold the whisky in question over the counter in the place of business was allowed to do so by the defendant as owner and operator, was not erroneous, especially in view of the proof that the general reputation was that it was a place where intoxicating liquors could be bought and were sold. *Tuminello v. Gully*, 189 Miss. 28, 193 So. 39 (1940), error overruled, 193 So. 925 (Miss. 1940).

The defendant, appealing to the supreme court with supersedeas, so far as the decree retaining the injunction against the sale of intoxicating liquors at his place of business, was in no position to successfully contend that he was not interested as owner, even though the oral testimony offered by the state tax collector of that issue might not clearly establish ownership. *Tuminello v. Gully*, 189 Miss. 28, 193 So. 39 (1940), error overruled, 193 So. 925 (Miss. 1940).

## RESEARCH REFERENCES

**Am Jur.** 45 Am. Jur. 2d, Intoxicating Liquors §§ 389 et seq.

12 Am. Jur. Pl & Pr Forms (Rev), Forfeitures and Penalties, Forms 41 et seq. (penalties).

**CJS.** 48 C.J.S., Intoxicating Liquors §§ 240-252, 262-269 et seq.

## § 99-27-41. Concurrent jurisdiction given chancery courts for enforcing § 99-27-39.

The chancery court shall have concurrent jurisdiction with courts of law to entertain suits under Section 99-27-39 for the enforcement thereof, instituted by the state, county, or any city, town or village, or by any taxpayer thereof, in the name of the state, county, city, town or village, or by the state tax commission, or by any tax collector within his county acting for them, and the chancery court shall have authority to suppress as a nuisance any place of business where the said section is violated, and by proper judgments and orders, punish and restrain the violators thereof.



**SOURCES:** Codes, Hemingway's 1917, § 2122; Laws, 1930, § 2001; Laws, 1942, § 2640; Laws, 1910, ch. 134; Laws, 1962, ch. 588, § 17, eff from and after Jan. 1, 1964.

**Cross References** — Jurisdiction of chancery court in general, see § 9-5-81.

## JUDICIAL DECISIONS

1. In general.
2. Jurisdiction.
3. Suppression of business.
4. Miscellaneous.

### 1. In general.

Code 1942, § 1291 which provides that a defendant in chancery shall answer fully all of the allegations of the bill, and that all averments of fact not denied by the answer otherwise than by general traverse may be taken at the hearing as admitted, applies to suits for penalties under Code 1942, § 2639 and this section [Code 1942, § 2640]. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

Under this section [Code 1942, § 2640] it was immaterial that the action was for penalty only, and it was not necessary that such jurisdiction also exist under Miss Const., Art. 6, § 150, since the constitution practically obliterates line of demarcation between courts of law and equity. *Miller v. State*, 114 Miss. 713, 75 So. 549 (1917).

This provision is not in conflict with Miss Const., Art. 6, § 159 defining jurisdiction of chancery court. *State ex rel. Att'y Gen. v. Marshall*, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

### 2. Jurisdiction.

While the circuit court has concurrent jurisdiction to grant relief in the matter of enforcing the collection of the tax in favor of the state and county, the jurisdiction is granted to the chancery court alone to suppress as a nuisance any place of business where intoxicating liquors are sold in violation of law, and to restrain the violators. *Craig v. Woods*, 190 Miss. 258, 199 So. 772 (1941).

Where an action by the state tax collector for the recovery of penalties for the unlawful sale of intoxicating liquors and for general equitable relief was erroneously transferred from the chancery court

to the circuit court, and it did not appear that any substantial right of the complainant was affected by the erroneous transfer, the only course open to the circuit court was to dismiss the action upon complainant's refusal to proceed. *Craig v. Woods*, 190 Miss. 258, 199 So. 772 (1941).

In the case of an erroneous transfer of an action by the state tax collector to recover the penalty for the unlawful sale of intoxicating liquors and for the abatement of a nuisance from the chancery to the circuit court was erroneous, the circuit court should and must proceed with the case, since there is no appeal from such erroneous transfer and no provision made for its correction. *Craig v. Woods*, 190 Miss. 258, 199 So. 772 (1941).

The transfer from chancery court to the circuit court of an action by the state tax collector to recover the penalty for unlawful sale of intoxicating liquors, wherein the bill contained a prayer for general equitable relief, although there was no specific prayer for abatement of the alleged nuisance nor for an injunction restraining the alleged violator of the law, was erroneous, since under such prayer for general relief the court would extend to the complainant such remedies as would be agreeable to the cause made out by the bill of complaint, whether specifically prayed for or not. *Craig v. Woods*, 190 Miss. 258, 199 So. 772 (1941).

The chancery court has jurisdiction concurrent with the courts of law to entertain suits to collect a statutory penalty for the unlawful sale of intoxicating liquors, in the name of any state, county, village or town, or any taxpayer of the state, county, city, town or village or the state tax collector, or any sheriff within the county acting for them, and the chancery court has express authority to suppress as a nuisance any place of business where the law is violated, by proper court order. *Noe v. Gully*, 189 Miss. 1, 193 So. 36 (1940), error overruled, 193 So. 927 (Miss. 1940).



**3. Suppression of business.**

Where an injunction to abate a liquor nuisance identified the place of the illegal business, defendant was guilty of contempt where the liquor was found about 100 yards from his place of business. *Atkins v. State*, 213 Miss. 360, 56 So. 2d 886 (1952).

Since preparations containing alcohol in large quantities, which are sold for beverage purposes, constitute "vinous or spirituous liquors," a suit to recover for the sale of intoxicating liquor, particularly alcohol for beverage purposes, and to suppress the place of business as a nuisance would more properly be brought under the sections of statute particularly relating thereto, than under a section authorizing the bringing of a suit to abate by injunction a place where liquor was alleged to have been sold. *State ex rel. v. Carr*, 191 Miss. 659, 4 So. 2d 237 (1941).

A defendant's drugstore would not be abated as a common nuisance on the ground that alcohol was sold in violation of the statute prohibiting any licensed retail drugstore from selling "pure" alcohol for medicinal purposes except on written prescription of a physician, where the suit was brought by the district attorney for the recovery of the tax imposed for selling or giving away liquors unlawfully,

and to obtain an injunction suppressing the business as a nuisance. *State ex rel. v. Carr*, 191 Miss. 659, 4 So. 2d 237 (1941).

The suppression of the place of business, under this section [Code 1942, § 2640], means not only the liquor business, but also a mercantile business with which such liquor business was carried on. *Malouf v. Gully*, 187 Miss. 331, 192 So. 2 (1939).

Where the liquor business is carried on in connection with some other business, such as a mercantile business, the chancery court is without authority to confine the relief to enjoining the sale of liquor alone—the commission of a criminal offense. *Malouf v. Gully*, 187 Miss. 331, 192 So. 2 (1939).

**4. Miscellaneous.**

Where a temporary injunction was issued against keeping liquor on the premises and later liquor was found, and defendant was guilty of contempt, his contention that the liquor could have been on the premises at the time of issue of injunction was invalid because the fiat of the chancellor contained no authority to enjoin the defendant from removing liquor off the premises and the injunction itself did not so enjoin. *Atkins v. State*, 213 Miss. 360, 56 So. 2d 886 (1952).

**§ 99-27-43. Justices of the peace not to suspend sentences.**

It shall be unlawful for any justice of the peace, with or without condition, to suspend any sentence lawfully imposed under Chapter 31 of Title 97, Mississippi Code of 1972, or this chapter.

**SOURCES:** Codes, 1930, § 2020; Laws, 1942, § 2659; Laws, 1922, ch. 210; Laws, 1950, ch. 348.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Circuit and county judges suspending sentences in misdemeanor cases, see § 99-19-25.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

**JUDICIAL DECISIONS****I. UNDER CURRENT LAW.**

1.-10. [Reserved for future use.]

**II. UNDER FORMER LAW.**

11. In general.

**I. UNDER CURRENT LAW.****1.-10. [Reserved for future use.]****II. UNDER FORMER LAW.****11. In general.**

Prior to February, 1950, the county courts were not authorized to suspend sentences in misdemeanor cases and any attempt of county judge to do so was unlawful. *Freeman v. State*, 220 Miss. 777, 72 So. 2d 139 (1954).

Judgment of county court which recites unconditional plea of guilty, definite assessment of punishment in form of fine and imprisonment followed by suspension of imprisonment on condition of good behavior of convict is complete and valid judgment excepting that part suspending sentence which is void. *Steadman v. State*, 204 Miss. 322, 37 So. 2d 357 (1948); *Edwards v. State*, 37 So. 2d 359 (Miss. 1948).

Release of defendant from custody on suspension of execution of sentence of imprisonment by county court, in excess of its powers, is unlawful and prisoner may be rearrested for service of suspended portion, without further court proceedings. *Steadman v. State*, 204 Miss. 322, 37 So. 2d 357 (1948); *Edwards v. State*, 37 So. 2d 359 (Miss. 1948).

That more than two years had elapsed since imposition of fine and sentence, part

of which had been unlawfully suspended by county judge, held not to relieve defendant from serving unsatisfied portion on ground that statute provided that no convict should be held in continuous confinement under conviction for any one offense for failure to pay fine and costs in such case for period of more than two years, where defendant was not in continuous confinement under suspended portion of sentence. *Cameron v. Thompson*, 178 Miss. 434, 173 So. 422 (1937).

Petitioner who was placed in jail by sheriff for unlawful possession of intoxicating liquor and held by sheriff for about two weeks, and then delivered to federal marshal and held by him in custody for six months under federal sentence, held not thereby to have liquidated, but to be still subject to, portion of fine and sentence for selling of intoxicating liquor, which county judge had unlawfully suspended. *Cameron v. Thompson*, 178 Miss. 434, 173 So. 422 (1937).

Suspension by county court of portion of fine and sentence for selling intoxicating liquor held void, release of defendant from custody of sheriff wrongful, and defendant thereafter still subject to arrest and confinement for unsatisfied portion of fine and sentence. *Cameron v. Thompson*, 178 Miss. 434, 173 So. 422 (1937).

## **§ 99-27-45. Witnesses compelled to testify; disclosure not to be used against witness.**

No person shall be excused from testifying before the grand jury or on the trial in any prosecution for any violation of this chapter or other law of this state for the promotion of temperance and the suppression of the evils of intemperance; but no disclosure or discovery made by such person is to be used against him in any criminal or penal prosecution for or on behalf of the matters disclosed.

**SOURCES:** Codes, Hemingway's 1921 Supp, § 2163k; Laws, 1930, § 2010; Laws, 1942, § 2649; Laws, 1918, ch. 189.

**Cross References** — Subpoena and swearing of witnesses before grand jury, see § 13-5-63.

### **RESEARCH REFERENCES**

**Lawyers' Edition.** Adequacy, under Federal Constitution, of immunity

granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

## CHAPTER 29

### Vagrancy Proceedings

SEC.

- 99-29-1. Officers required to give information under oath charging vagrancy; warrant to issue.
- 99-29-3. Any resident may file information charging vagrancy.
- 99-29-5. Arrested vagrant to be taken before proper judge for hearing.
- 99-29-7. Bonds to be returned to circuit court and docketed on criminal docket; duty of certain officers to put bond in suit.
- 99-29-9. Suit and recovery on bond.
- 99-29-11. Vagrant may be rearrested after bond forfeited.
- 99-29-13. Circuit court shall have concurrent jurisdiction; duty of judge to charge grand jury.

#### **§ 99-29-1. Officers required to give information under oath charging vagrancy; warrant to issue.**

It shall be the duty of every sheriff, deputy sheriff and constable in every county, and of the police, town marshal, deputy marshals, and of other like officials in every county, city, town, or village in the state to give information under oath to any officer empowered to issue criminal warrants of all vagrants within their knowledge, or whom they have good reason to suspect as being vagrants in their respective counties, cities, towns, and villages; thereupon the said officer shall issue a warrant for the apprehension of the person alleged to be a vagrant.

**SOURCES:** Codes, 1906, § 5056; Hemingway's 1917, § 3333; Laws, 1930, § 3473; Laws, 1942, § 2667.

**Editor's Note** — At the direction of the co-counsel for the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, the following correction was made to this section: in the first sentence, "every sheriff, deputy sheriff and constable" was substituted for "every sheriff, deputy sheriff and constables."

**Cross References** — General duties of constables, see § 19-19-5.

Duty of sheriff to keep the peace, see § 19-25-67.

Duties of marshal or chief of police, see § 21-21-1.

Vagrants generally, see §§ 97-35-37 through 97-35-43.

#### **§ 99-29-3. Any resident may file information charging vagrancy.**

All informations charging vagrancy shall be under oath; and while it is made the special duty of the officers named in Section 99-29-1 to file the said information whenever they shall have knowledge or good reason to suspect that any person is a vagrant as defined by Section 97-35-37 or any section of this chapter, yet any information charging vagrancy may be charged under oath by any resident of this state.



**SOURCES:** Codes, 1906, § 5057; Hemingway's 1917, § 3334; Laws, 1942, § 2668; Laws, 1930, § 3474.

**Cross References** — Vagrants generally, see §§ 97-35-37 through 97-35-43.

### RESEARCH REFERENCES

**Am Jur.** 77 Am. Jur. 2d, Vagrancy §§ 3 et seq.      **CJS.** 91 C.J.S., Vagrancy § 4, 5.

## § 99-29-5. Arrested vagrant to be taken before proper judge for hearing.

Whenever any person shall have been arrested on a charge of vagrancy, he shall immediately be carried before a justice court judge of the county in which the offense occurs, or before the municipal judge of any city, town or village, if said offense occurs within the corporate limits of same, and evidence shall be heard on the charge of his being a vagrant.

**SOURCES:** Codes, 1906, § 5058; Hemingway's 1917, § 3335; Laws, 1930, § 3475; Laws, 1942, § 2669; Laws, 1981, ch. 471, § 56, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws of 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws of 1982, ch. 423, § 28, eff from and after March 31, 1982).

**Cross References** — Vagrants generally, see §§ 97-35-37 through 97-35-43.

### JUDICIAL DECISIONS

1. In general.
2. Timeliness.

#### 1. In general.

Trial of a husband and father for vagrancy for failure to support his wife and child is in effect a controversy between the husband and wife and the wife is competent to testify against him. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

It being shown that defendants, charged with being common prostitutes, had no other means of support, did not work, but habitually arrayed themselves in the evening and sat on the front steps or strolled on the street and solicited men, who went into the house with them, when the doors would be closed, together with evidence of other like acts, a conviction will not be disturbed. In such cases direct

proof of guilt is not required; it may be inferred from circumstances. *Peabody v. State*, 72 Miss. 104, 17 So. 213 (1894).

## 2. Timeliness.

Where the inmate filed for post-conviction relief more than four years after en-

tering his guilty plea, the claims were barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-29-5(2). The trial court properly denied post-conviction relief. *Fair v. State*, 910 So. 2d 649 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**Am Jur.** 77 Am. Jur. 2d, Vagrancy §§ 3 et seq.

**CJS.** 91 C.J.S., Vagrancy § 6.

## § 99-29-7. Bonds to be returned to circuit court and docketed on criminal docket; duty of certain officers to put bond in suit.

All bonds taken shall be returned to the circuit court, and shall be docketed on the criminal docket of the circuit court by the clerk thereof, and shall be brought forward from term to term until the expiration of the time for which same is given, and there shall be no exemptions allowed against liability on such bonds. And it is hereby made the duty of the district attorney and the circuit judge to give diligent attention to all such bonds, and to place the same in suit whenever it shall appear that the said bond has been forfeited, and it is made the duty of the justice of the peace or mayor or police to inform the district attorney immediately whenever they shall discover or have good reason to believe that said bond has been forfeited.

**SOURCES:** Codes, 1906, § 5060; Hemingway's 1917, § 3337; Laws, 1930, § 3477; Laws, 1942, § 2671.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

Duties of district attorney generally, see § 25-31-11.

Vagrants generally, see §§ 97-35-37 through 97-35-43.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

Suit and recovery on bond, see § 99-29-9.

Vagrant may be rearrested after bond forfeited, see § 99-29-11.

## RESEARCH REFERENCES

**CJS.** 91 C.J.S., Vagrancy § 8.

## § 99-29-9. Suit and recovery on bond.

The bond provided for by Section 97-35-39 shall be made payable to the State of Mississippi, and may be sued upon, in case of breach, in the name of the state, and in the circuit court, and such suit shall be triable at the first term of the circuit court after the breach occurs, provided the sureties on such bond

are summoned five days before court meets. And such suit shall be conducted by the district attorney, for the state, in the circuit court, and by the attorney general in the supreme court. Whenever any bond so taken shall be forfeited by the misconduct of the said vagrant, there shall be no recovery of same less than the face value of the bond, unless the vagrant shall be delivered up to the circuit court for future trial, as provided in Section 99-29-11, in which event the court may, in its discretion, limit the amount of recovery on the bond to the cost of suit and a penalty of fifty dollars.

**SOURCES:** Codes, 1906, § 5058; Hemingway's 1917, § 3335; Laws, 1930, § 3475; Laws, 1942, § 2669.

**Cross References** — Other sections derived from same 1942 code section, see §§ 97-35-29, 99-25-5.

### **§ 99-29-11. Vagrant may be rearrested after bond forfeited.**

Whenever any vagrant shall forfeit his bond as provided for in Section 99-29-9, by any misconduct amounting to a breach of the bond, and the court in which the bond is to be sued upon shall have judicially so determined, such vagrant may be rearrested immediately, and placed on trial before the justice of the peace or mayor or police justice before whom the original proceedings were had, or may be immediately indicted by the grand jury and placed on trial in the circuit court as a vagrant.

**SOURCES:** Codes, 1906, § 5059; Hemingway's 1917, § 3336; Laws, 1930, § 3476; Laws, 1942, § 2670.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

### **§ 99-29-13. Circuit court shall have concurrent jurisdiction; duty of judge to charge grand jury.**

The circuit court shall have concurrent jurisdiction to try all cases arising under Sections 97-35-37 through 97-35-43 and this chapter, and to impose the same fines and penalties, and to require the giving of bonds as required. Prosecutions may be begun by indictment of the grand jury; and it shall be the duty of each circuit judge to charge each grand jury especially with reference to Sections 97-35-37 through 97-35-43 and this chapter.

**SOURCES:** Codes, 1906, § 5063; Hemingway's 1917, § 3340; Laws, 1930, § 3480; Laws, 1942, § 2674.

**Cross References** — Jurisdiction of circuit court, see § 9-7-81.  
Vagrants generally, see §§ 97-35-37 through 97-35-43.



**CHAPTER 31**  
**Obscene Publications Proceedings**  
**[Repealed]**

**§§ 99-31-1 through 99-31-27. Repealed.**

Repealed by Laws, 1983, ch. 498, § 7, eff from and after July 1, 1983.

§ 99-31-1. [Codes, 1942, § 2674-01; Laws, 1962, ch. 322, § 1]

§ 99-31-3. [Codes, 1942, § 2674-02; Laws, 1962, ch. 322, § 2]

§ 99-31-5. [Codes, 1942, § 2674-04; Laws, 1962, ch. 322, § 4]

§ 99-31-7. [Codes, 1942, § 2674-05; Laws, 1962, ch. 322, § 5]

§ 99-31-9. [Codes, 1942, § 2674-06; Laws, 1962, ch. 322, § 6]

§ 99-31-11. [Codes, 1942, § 2674-07; Laws, 1962, ch. 322, § 7]

§ 99-31-13. [Codes, 1942, § 2674-08; Laws, 1962, ch. 322, § 8]

§ 99-31-15. [Codes, 1942, § 2674-09; Laws, 1962, ch. 322, § 9]

§ 99-31-17. [Codes, 1942, § 2674-10; Laws, 1962, ch. 322, § 10]

§ 99-31-19. [Codes, 1942, § 2674-11; Laws, 1962, ch. 322, § 11]

§ 99-31-21. [Codes, 1942, § 2674-13; Laws, 1962, ch. 322, § 13]

§ 99-31-23. [Codes, 1942, § 2674-14; Laws, 1962, ch. 322, § 14]

§ 99-31-25. [Codes, 1942, § 2674-15; Laws, 1962, ch. 322, § 15]

§ 99-31-27. [Codes, 1942, § 2674-16; Laws, 1962, ch. 322, § 16]

**Editor's Note —** Former § 99-31-1 was entitled: Title.

Former § 99-31-3 was entitled: Definitions.

Former § 99-31-5 was entitled: Commencement of action for adjudication of obscenity of mailable matter.

Former § 99-31-7 was entitled: Filing and form of complaint.

Former § 99-31-9 was entitled: Examination of complaint and mailable matter.

Former § 99-31-11 was entitled: Appearance of respondents and amicus curiae-answer-final judgment or trial date.

Former § 99-31-13 was entitled: Public policy-procedure-trial by jury-evidence.

Former § 99-31-15 was entitled: Judgment.

Former § 99-31-17 was entitled: Injunctions.

Former § 99-31-19 was entitled: When mailable matter is subject to criminal provisions.

Former § 99-31-21 was entitled: Execution.

Former § 99-31-23 was entitled: Extradition.

Former § 99-31-25 was entitled: Presumptions.

Former § 99-31-27 was entitled: Nonresidents and noncitizens-acts submitting to jurisdiction-process-consent.

## CHAPTER 33

### Prosecutions Before Justice Court Judges

SEC.	
99-33-1.	Criminal jurisdiction.
99-33-2.	Commencing criminal cases; duties of clerk and judge; penalty for failure of judge to comply.
99-33-3.	Procedures in criminal cases; minimum fine which may be imposed.
99-33-5.	Subpoena may issue to any county.
99-33-7.	Appearance bond may be taken.
99-33-9.	Trial by jury.
99-33-11.	Repealed.
99-33-13.	Procedure when accused is guilty of felony; remand.
99-33-15.	Authority to sentence misdemeanor to imprisonment on weekends or other nonworking hours.
99-33-17.	Transfer of criminal case from justice court to municipal court in case of conflict.

#### § 99-33-1. Criminal jurisdiction.

(1) Upon the election of any county to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 9-11-27 prior to January 1, 1984, the venue of criminal actions in such county shall be as provided in subsection (2) of this section.

(2) From and after January 1, 1984, justice court judges shall have jurisdiction concurrent with the circuit court of the county over all crimes occurring in the county whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail.

(3) A circuit court grand jury, after an evidentiary determination, may remand any case that may be tried as a felony or misdemeanor, and which it deems should be tried as a misdemeanor, to justice or municipal court to be tried as a misdemeanor.

**SOURCES:** Codes, 1871, § 1304; 1880, § 2216; 1892, § 2420; Laws, 1906, § 2749; Hemingway's 1917, § 2248; Laws, 1930, § 2097; Laws, 1942, § 1831; Laws, 1981, ch. 471, § 2; Laws, 1982, ch. 423, § 2; Laws, 2007, ch. 495, § 1, eff from and after July 1, 2007.

**Editor's Note** — Section 9-11-27 does not have a subsection (3), as referred to in subsection (1). Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Amendment Notes** — The 2007 amendment deleted former (1), (2), and (4), which contained a January 1, 1984 repealer for former (1) and (2); redesignated former (3) as present (1), and in (1), substituted "subsection (2)" for "subsection (5)" and deleted the former last sentence, which read: "Actions filed prior to such time shall be concluded pursuant to the provisions of subsection (1) of this section"; redesignated former (5) as present (2); and added (3).

**Cross References** — Authorization of prosecutions before justice court judge, see Miss. Const. Art. 3, § 27.

Jurisdiction of county court generally, see §§ 9-9-1 et seq.

Justice courts generally, see § 9-11-2 et seq.

Jurisdiction of justices of the peace over civil cases, see § 9-11-9.

Money paid into the justice court clerk clearing account, see § 9-11-18.

Members of county board of supervisors as conservators of the peace with all powers of justices of the peace, see § 19-3-39.

Issuance of arrest warrant by justice of peace for offenders coming into his jurisdiction, see § 99-3-21.

Issuance by justice of the peace of warrant for arrest of fugitive from another state, see § 99-21-1.

## JUDICIAL DECISIONS

1. Validity.
2. Jurisdiction in general.
3. Territorial limits.
4. Lack of qualified justice of peace in district.
5. Waiver.
6. Particular offenses.
7. Disposition of cases.

### 1. Validity.

Mississippi criminal statutory fees systems for compensating justices of the peace in Hinds and DeSoto Counties are violative of defendant's due process rights to trial before impartial tribunal under the Tumey-Ward test, where the possibility existed that judges in the aforementioned counties would compete for business by currying favor with arresting officers or taking biased actions to increase their case load, and where a judge might minimize the burden of proof required to convict the defendant or might be less than diligent in protecting the defendant's constitutional rights. *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1981).

In declining to follow *Melikian v. Avent* (ND Miss. 1969) 300 F Supp 516, the reviewing court held that the civil side of the Mississippi fee system did not comport with due process, in light of the record which supported the inference that creditors would file more frequently in the courts of the judges who tended to favor the plaintiffs, and where there was testimony to this effect, and further testimony to the affect that judges knew and understood this to be the case, and where the undisputed evidence showed that cases were unevenly distributed throughout the judges in the various counties. *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1981).

In view of the constitutional ordination that all courts shall be open and that every person shall have a remedy for any

injury, and the fact that the constitution nowhere makes provision for cases of disqualification or total lack of a justice of the peace in a county supervisor's district, this section [Code 1942, § 1831], in providing that if there should not be a justice of the peace in the district in which any crime was committed qualified to try the accused, any justice of the peace of the county should have jurisdiction thereof, is valid. *Farrar v. State*, 191 Miss. 1, 2 So. 2d 146 (1941).

### 2. Jurisdiction in general.

A county court, though having concurrent jurisdiction with a justice of the peace court over the crime of assault and battery, did not have jurisdiction to proceed with defendant's prosecution for that crime where the justice of the peace court had first acquired full and exclusive jurisdiction of the case and the case was still pending there when an affidavit charging defendant with the same crime was filed with the county court. *Franklin v. Franklin*, 335 So. 2d 907 (Miss. 1976).

A justice of the peace is not civilly liable for acts performed by him within his jurisdiction, but liability may be imposed when he acts without his jurisdiction. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

Where there was a justice of peace qualified to try the defendant in the district where the offense of operating a motor vehicle while intoxicated was allegedly committed, a justice of peace of another district had no jurisdiction to try the case, and a judgment entered therein was a nullity. *Travis v. State*, 230 Miss. 578, 93 So. 2d 468 (1957).

In the absence of any showing in the record that there was not a justice of peace in the district where the alleged crime was committed, qualified to try the defendant,



the justice of peace of another district was without jurisdiction and therefore the circuit court acquired no jurisdiction and the supreme court alike acquired no jurisdiction. *Winborn v. State*, 213 Miss. 322, 56 So. 2d 885 (1952).

One of two courts of concurrent jurisdiction may, by valid order of dismissal, relinquish its exclusive jurisdiction acquired by criminal prosecution being first instituted therein, so that the other court may proceed then with prosecution of same offense. *Hegwood v. State*, 206 Miss. 160, 39 So. 2d 865 (1949).

Dismissal without prejudice, on motion of state, of proceeding against defendant in justice of the peace court for unlawful possession of intoxicating liquor does not prevent indictment of defendant for same offense in circuit court having concurrent jurisdiction. *Hegwood v. State*, 206 Miss. 160, 39 So. 2d 865 (1949).

The rule that where concurrent jurisdiction is vested in two courts the court first acquiring jurisdiction should proceed with the trial and disposition of the case, is intended to prevent confusion and conflicts in jurisdiction, and to prevent a person from being twice tried for the same offense, and no defendant has the vested right to be tried in any particular court of concurrent jurisdiction. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

While justice of the peace court and the circuit court have concurrent jurisdiction of misdemeanors, whenever there is an indictment and arrest, in either court, jurisdiction is then exclusive; but until then, in the absence of any allegation and proof of fraud or collusion, either court may proceed. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Mere lodging of an affidavit charging unlawful possession of intoxicating liquor with a justice of the peace did not confer final and exclusive jurisdiction on such justice court so as to preclude the circuit court from indicting and trying the offender where no warrant for the offender's arrest had been issued by the justice of the peace prior to the indictment. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

An affidavit charging commission of a crime is essential to confer jurisdiction on a justice of the peace to try and punish the

offender. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Mere fact that affidavit charging commission of a crime was made and lodged with justice of the peace while he was out of his court district attending circuit court at the county seat, did not deprive the justice of jurisdiction. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Where there is qualified justice of peace in district in which misdemeanor is committed, justice in no other district has jurisdiction; where defendants were charged with crime before justice having no jurisdiction, and charge was still pending, circuit court had jurisdiction of offense. *Thompson v. State*, 153 Miss. 593, 121 So. 275 (1929).

A justice of the peace having jurisdiction of a misdemeanor takes exclusive jurisdiction thereof. *Hampton v. State*, 138 Miss. 196, 103 So. 10 (1924).

The justice of the peace of the district in which the threats are made or in which occurs the hostile action has jurisdiction of the offense. *Ford v. State*, 96 Miss. 85, 50 So. 497 (1909).

Fact that justice of the peace for a town is given power by municipal charter, which he would not otherwise have, to try violations of ordinances of the town does not limit him to criminal jurisdiction, the jurisdiction of justices of the peace being regulated by general law conferring both civil and criminal jurisdiction. *Matthews v. Cotton*, 83 Miss. 472, 35 So. 937 (1904).

### 3. Territorial limits.

A cause of action for malicious prosecution was not stated in a declaration which did not allege that the defendant justice of the peace had any knowledge of the truth or falsity of the affidavit charging plaintiff with violation of Code 1942, § 2153 at the time of issuance of the warrant, did not allege that the justice of the peace had any financial interest in the money obtained by plaintiff when he issued the warrant, did not allege that the justice of the peace, at the time of issuing the warrant, had personal knowledge that the prosecution was being instituted for the collection of a civil debt, and did not allege that the justice of the peace did not have territorial jurisdiction of the offense charged in the

affidavit. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

The jurisdiction of the justice of the peace over misdemeanors is confined to those committed within his district. *Childres v. State*, 136 Miss. 829, 101 So. 857 (1924).

The criminal jurisdiction of a mayor as ex-officio justice is restricted by Code 1892, § 2420 [Code 1942, § 1831], to the corporate limits and an affidavit before him charging a misdemeanor to have been committed in the district in which the town is situated, but not averring that it was in the town, states an imperfect venue. *Burnett v. State*, 72 Miss. 994, 18 So. 432 (1895).

#### 4. Lack of qualified justice of peace in district.

One accused of misdemeanor committed in a supervisor's district in which there was no justice of the peace could be tried in the justice of the peace court of an adjoining district. *Farrar v. State*, 191 Miss. 1, 2 So. 2d 146 (1941).

#### 5. Waiver.

If a justice has jurisdiction of the subject-matter of a criminal prosecution, the defendant waives the question of the jurisdiction of his person by pleading "not guilty" and going to trial. *Holley v. State*, 74 Miss. 878, 21 So. 923 (1897).

#### 6. Particular offenses.

A justice of the peace has no jurisdiction, other than to require bail for appearance in circuit court to await action of grand jury, on an affidavit charging a second offense of possessing a gambling device (Code 1942, § 2047). *Ellis v. State*, 203 Miss. 330, 33 So. 2d 837 (1948).

Justice of the peace had jurisdiction of defendant charged with selling liquor and of subject-matter where offense was misdemeanor and sentence was by fine and imprisonment in county jail. *Hitt v. State*, 149 Miss. 718, 115 So. 879 (1928).

Under this section [Code 1942, § 1831] a justice has no authority to bind a defendant over to appear before the circuit court to await the action of the grand jury on a charge of conspiracy to rob, but he should have himself disposed of the case, and a bond given by accused to so appear was void. *Smith v. State*, 86 Miss. 315, 38 So. 319 (1905).

#### 7. Disposition of cases.

Where a justice of the peace continues a criminal case to a definite date the case cannot be dismissed in vacation without the consent of the defendant. *Chandler v. State*, 140 Miss. 524, 106 So. 265 (1925).

A defendant being charged before a justice of the peace for a felony, the justice of the peace must dismiss or transfer the cause where it develops that the offense was committed in another district and is only a misdemeanor. *Ivy v. State*, 141 Miss. 877, 106 So. 111 (1925).

A justice of the peace must finally dispose of misdemeanors where he has jurisdiction and cannot bind over the defendant for the circuit court thereunder. *Young v. State*, 140 Miss. 165, 105 So. 461 (1925).

A justice of the peace is without authority to bind a defendant over to appear before the circuit court to await the action of the grand jury on a charge of having committed a misdemeanor. *Smith v. State*, 86 Miss. 315, 38 So. 319 (1905).

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Justices of the Peace §§ 10 et seq., 35.

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

**§ 99-33-2. Commencing criminal cases; duties of clerk and judge; penalty for failure of judge to comply.**

(1) Anyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court. The clerk shall record all affidavits and shall, as far as practicable, assign criminal cases to the justice court judges in the county on a rotating basis to ensure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business.

(2) When the case has been recorded and assigned and all necessary process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

(3) Within forty-eight (48) hours of the receipt of any criminal affidavit lodged with a justice court judge, the justice court judge shall forward such affidavit and all documents pertaining thereto to the clerk of the justice court for the recording of such affidavit and documents and the assignment of the case as provided in subsection (1) of this section. Any justice court judge who willfully fails or refuses to comply with this subsection shall be guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail not more than six (6) months, or both.

**SOURCES:** Laws, 1981, ch. 471, § 14; Laws, 1982, ch. 423, § 11; Laws, 1991, ch. 551, § 2, eff from and after October 1, 1991.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

Justice court clerk assigning civil and criminal cases to justice court judges in accordance with this section, see § 9-11-27.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for misdemeanor and felony violation, see § 99-19-73.

**JUDICIAL DECISIONS**

**1. In general.**

Justice court judge did not interfere with rotation of cases so as to create forum shopping or violate judicial canons, where it was practice of judges to handle cases for each other when the other was un-

available and statutes did not prohibit judges from handling each other's cases when a judge is unavailable. Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

**ATTORNEY GENERAL OPINIONS**

All cases, civil and criminal, shall be assigned by clerk to justice court judges of county in manner provided in this section.

Ferguson, June 9, 1993, A.G. Op. #93-0331.

Subsection (3) of this section provides



that justice court judge must, within forty-eight hours, forward any affidavit to justice court clerk who shall record affidavit and assign case to proper judge pursuant to rotation. Ferguson, June 9, 1993, A.G. Op. #93-0331.

This section requires justice court clerk to assign cases to judges on rotation basis; however, as for setting docket, judges have discretion as to cases assigned; judges may establish procedure whereby clerk sets docket. Ferguson, June 9, 1993, A.G. Op. #93-0331.

Based on subsection (2) of this section, the clerk must forward a certified copy of the case file to the judge within two days after the case has been recorded and assigned and all necessary process has been issued. If there are any significant additions or changes in the case file prior to the court date, those additions or changes should be forwarded to the judge prior to

court. Maness, June 21, 1996, A.G. Op. #96-0407.

Upon presentation of an affidavit charging someone with a crime, the justice court judge must determine from the affidavit and other evidence received under oath whether there is probable cause to believe that a crime was committed and that the defendant committed the offense, and if so, the judge must issue a warrant, but if not, the judge may refer the matter to the sheriff for further investigation. Broadhead, July 3, 1997, A.G. Op. #97-0389.

To commence an action in justice court pursuant to the statute, an officer must file or lodge the affidavit with the justice court in the county where the cause accrued and the case is to be heard. Blackney, May 31, 2002, A.G. Op. #02-0274.

### § 99-33-3. Procedures in criminal cases; minimum fine which may be imposed.

On affidavit of the commission of any crime, of which the justice court has jurisdiction, lodged with the justice court, the clerk shall, upon direction by a justice court judge of the county, issue a warrant for the arrest of the offender returnable forthwith or on a certain day to be named. The clerk, or the justice court judge to whom the case is assigned, shall issue subpoenas for witnesses as in civil cases, and the justice court judge may enter a conviction as provided in Section 99-19-3, or shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides; provided, however, that no fine imposed shall be in an amount less than Fifteen Dollars (\$15.00).

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 2(8); 1857, ch. 64, art. 329; 1871, § 1322; 1880, § 2217; 1892, § 2421; Laws, 1906, § 2750; Hemingway's 1917, § 2249; Laws, 1930, § 2098; Laws, 1942, § 1832; Laws, 1966, ch. 354, § 1; Laws, 1974, ch. 352; Laws, 1982, ch. 423, § 12; Laws, 2002, ch. 320, § 2, eff from and after July 1, 2002.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

Convictions obtained only by verdict or guilty plea — no punishment without legal conviction — waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations, see § 99-19-3.

Imposition of standard state assessment in addition to court imposed fines or other penalties for any misdemeanor, see § 99-19-73.

Right of appeal, see §§ 99-35-1 et seq.

## JUDICIAL DECISIONS

1. Affidavit.
2. Trial and disposition.
3. Judgment.
4. Waiver.
5. Binding over for grand jury.

### 1. Affidavit.

A cause of action for malicious prosecution was not stated in a declaration which did not allege that the defendant justice of the peace had any knowledge of the truth or falsity of the affidavit charging plaintiff with violation of Code 1942, § 2153 at the time of issuance of the warrant, did not allege that the justice of the peace had any financial interest in the money obtained by plaintiff when he issued the warrant, did not allege that the justice of the peace, at the time of issuing the warrant, had personal knowledge that the prosecution was being instituted for the collection of a civil debt, and did not allege that the justice of the peace did not have territorial jurisdiction of the offense charged in the affidavit. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

Justice of the peace is not required under this section [Code 1942, § 1832] to mark an affidavit in support of a search warrant "filed" before the search warrant can be issued. *Wince v. State*, 206 Miss. 189, 39 So. 2d 882 (1949).

An affidavit filed before a police justice charging wilful and unlawful possession of intoxicating beer contrary to the laws and ordinances of the city was insufficient to charge an offense since the state law permitted possession of beer for personal consumption. *City of Amory v. Yielding*, 203 Miss. 265, 34 So. 2d 726 (1948).

An affidavit charging commission of a crime is essential to confer jurisdiction on a justice of the peace to try and punish the offender. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Mere fact that affidavit charging commission of a crime was made and lodged with justice of the peace while he was out of his court district attending circuit court at the county seat, did not deprive the justice of jurisdiction. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Mere lodging of an affidavit charging unlawful possession of intoxicating liquor

with a justice of the peace did not confer final and exclusive jurisdiction on such justice court so as to preclude the circuit from indicting and trying the offender where no warrant for the offender's arrest had been issued by the justice of the peace prior to the indictment. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

The affidavit is a prerequisite to prosecution for misdemeanor; it is the foundation of the jurisdiction of the justice of the peace and the court has no jurisdiction without it. *Bramlette v. State*, 193 Miss. 24, 8 So. 2d 234 (1942).

Where defendant was tried and convicted by a justice of the peace upon what purported to be an affidavit charging unlawful possession of intoxicating liquor, such affidavit being neither signed nor sworn to until after conviction and appeal taken therefrom, defendant was tried without due process, and on appeal the circuit court could not, by allowing the belated affidavit to stand, at once retroactively bestow upon and borrow from the justice of the peace its jurisdiction. *Bramlette v. State*, 193 Miss. 24, 8 So. 2d 234 (1942).

A defendant convicted of a misdemeanor will not be released on habeas corpus because of defects in the affidavit. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708 (1901).

An affidavit is essential to confer jurisdiction to try and punish an offender. *Bigham v. State*, 59 Miss. 529 (1882).

### 2. Trial and disposition.

A justice of the peace must finally dispose of misdemeanors where he has jurisdiction and cannot bind over the defendant for the circuit court thereunder. *Young v. State*, 140 Miss. 165, 105 So. 461 (1925).

### 3. Judgment.

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trials in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judg-

ment to the verdict of such a jury: *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

Where a justice acquires jurisdiction of the person of a defendant charged with a misdemeanor, his judgment cannot be collaterally attacked. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708 (1901).

The failure of a justice for several days after a trial and conviction and the adjournment of his court, to enter judgment against the accused, being merely clerical, affords no ground for the offender's discharge. *Lurenberger v. State*, 74 Miss. 379, 21 So. 134 (1897).

#### 4. Waiver.

If a justice of the peace has jurisdiction of the subject-matter of a criminal prosecution, the defendant waives the question of the jurisdiction of his person by pleading "not guilty" and going to trial. *Holley v. State*, 74 Miss. 878, 21 So. 923 (1897).

#### 5. Binding over for grand jury.

A justice has no authority to bind a defendant over to appear before the circuit court to await the action of the grand jury on a charge of conspiracy to rob, but he should have himself disposed of the case, and a bond given by accused to so appear was void. *Smith v. State*, 86 Miss. 315, 38 So. 319 (1905).

A defendant charged with a misdemeanor who has been bound over to the circuit court and imprisoned for default in making bond, cannot maintain habeas corpus to have his case remanded to the magistrate for trial. *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901).

Where a defendant is charged with assault and battery and it appears that the injured party died from the defendant's blows, it is not improper but wise to bind the defendant over to await the action of the grand jury. *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901).

### ATTORNEY GENERAL OPINIONS

Justice court clerk has both power and duty to issue witness subpoenas in criminal and civil cases pursuant to Miss. Code Section 99-33-3. *Ferguson*, June 9, 1993, A.G. Op. #93-0331.

The duty of the clerk of the justice court to direct the sheriff of his county and his deputies to execute any process of the

justice court that has not been returned by a constable within ten working days applies to civil process; a justice court is not required to issue criminal process, i.e., arrest warrants, to constables for a ten day period before directing such warrants to a sheriff's department. *Allgood*, January 23, 1998, A.G. Op. #98-0011.

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Justices of the Peace §§ 23 et seq.

#### § 99-33-5. Subpoena may issue to any county.

A justice of the peace may issue a subpoena for a witness to any county, in a criminal case, and enforce obedience thereto.

**SOURCES:** *Codes*, *Hutchinson's* 1848, ch. 50, art. 2(6); 1857, ch. 64, art. 334; 1871, § 2827; 1880, § 3117; 1892, § 2429; *Laws*, 1906, § 2758; *Hemingway's* 1917, § 2257; *Laws*, 1930, § 2106; *Laws*, 1942, § 1840.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Fees of justice of the peace, see § 25-7-25.

Issuance of subpoena by conservator of the peace, see § 99-15-9.



## § 99-33-7. Appearance bond may be taken.

It is lawful for any officer having a person in custody by virtue of a warrant of a justice court judge, in a case in which the judge has a final jurisdiction, to take bond with sufficient sureties, in a sum of not less than Fifty Dollars (\$50.00), nor more than One Thousand Dollars (\$1,000.00), except for the violation of any of the criminal statutes of Mississippi prohibiting the sale and possession of intoxicating liquors, when the bond shall not be less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) conditioned for the appearance of such person on the return-day of the writ before the justice court judge before whom the warrant is returnable, and to fix the amount of the bond, which shall be returned to the judge and be filed and proceeded on by him in a case of forfeiture, if for not more than Two Hundred Dollars (\$200.00), as in like cases in the circuit court, as near as may be. A justice court judge before whom any person is brought for trial may take bond or recognizance in such like sum as he may affix, for such person, or may authorize the sheriff or constable to take bond of him for his appearance on adjournment from time to time, and from day to day, or to a subsequent day, for trial, and to be proceeded on in case of forfeiture as provided above. When a bond of recognizance shall exceed in its penalty One Thousand Dollars (\$1,000.00) and be forfeited, the justice court judge shall return the bond or a true copy of the recognizance to the circuit court, with his certificate of the forfeiture; and the circuit court shall enter judgment nisi thereon, and thereafter proceed as if the same had been for appearance in that court.

**SOURCES:** Codes, 1871, § 1325; 1880, § 2220; 1892, § 2423; Laws, 1906, § 2752; Hemingway's 1917, § 2251; Laws, 1930, § 2100; Laws, 1942, § 1834; Laws, 1924, ch. 247; Laws, 1991, ch. 323, § 1, eff from and after July 1, 1991.

**Cross References** — Money paid into the justice court clerk clearing account, see § 9-11-18.

Bail generally, see §§ 99-5-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

A sheriff has the right, by necessary implication, to fix the amount of bail of a person arrested without a warrant for a misdemeanor committed in his presence and to determine the sufficiency of the bail bond tendered to him. *Sheffield v. Reece*, 201 Miss. 133, 28 So. 2d 745 (1947).

Bond for the appearance of accused in bastardy proceedings erroneously accepted by sheriff, since justice of the peace cannot finally dispose of a bastardy case,

procured the release of the accused and the justice of the peace had jurisdiction to take a forfeiture thereon for that reason and so certify to the circuit court for its final judgment thereon as required by this section [Code 1942, § 1834], the bond being in excess of \$200, and, being valid and binding as having obtained the release of accused, the circuit court had power to enter judgment against principal and sureties. *Boykin v. West*, 183 Miss. 567, 184 So. 624 (1938).

## ATTORNEY GENERAL OPINIONS

Under this section, the sheriff has the authority to set and approve bail, where not already fixed and approved by a judicial officer, for persons arrested for misdemeanor offenses. Welch, August 16, 1995, A.G. Op. #95-0452.

In addition to this section, §§ 19-25-67 and 99-5-15 give a sheriff the authority to take or approve bonds. Tolar, Oct. 31, 2003, A.G. Op. 03-0571.

## § 99-33-9. Trial by jury.

A defendant in a criminal case before a justice of the peace may, in like manner as in civil cases, demand a jury, and thereupon the justice shall proceed as in other cases.

**SOURCES:** Codes, 1871, § 1330; 1880, § 2226; 1892, § 2428; Laws, 1906, § 2757; Hemingway's 1917, § 2256; Laws, 1930, § 2105; Laws, 1942, § 1839.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Right of appeal, see §§ 99-35-1 et seq.

## JUDICIAL DECISIONS

## 1. In general.

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trial in justice of the peace courts, composed of a fair cross-section of the citizens of the community,

completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. Shaffer v. Bridges, 295 F. Supp. 869 (S.D. Miss. 1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

## ATTORNEY GENERAL OPINIONS

A justice court judge must grant a jury trial to a criminal defendant if the defendant requests one in a timely manner. Bush, Oct. 25, 2002, A.G. Op. #02-0614.

A criminal defendant in justice court is entitled to a jury trial pursuant to this section. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

The costs of a jury trial can be assessed to a defendant who is convicted. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

A justice court may deny a jury trial to a criminal defendant if the defendant does not make the request for a jury trial in a timely manner. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 41 et seq.

**CJS.** 50A C.J.S., Juries §§ 141 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:13.

## § 99-33-11. Repealed.

Repealed by Laws, 1979, ch. 501, § 4, eff from and after April 18, 1979.

[Codes, 1871, § 1323; 1880, § 2218; 1892, § 2422; 1906, § 2751; Hemingway's 1917, § 2250; 1930, § 2099; 1942, § 1833]

**Editor's Note** — Former § 99-33-11 was entitled: Convict committed until fine and costs paid.

**§ 99-33-13. Procedure when accused is guilty of felony; remand.**

If on the trial of any criminal case the justice court judge discover that it is a felony, and not a misdemeanor, of which the accused has been guilty, he shall not punish the offender nor render any judgment finally disposing of the case, but shall require him to give bail for his appearance in the circuit court, unless the felony be not bailable, in which case the justice shall commit him without bail. A circuit court grand jury may remand a case to justice court to be tried as a misdemeanor after finding that the felony charge presented should be remanded with its bond to justice or municipal court to be tried as a misdemeanor.

**SOURCES:** Codes, 1880, § 2221; 1892, § 2424; Laws, 1906, § 2753; Hemingway's 1917, § 2252; Laws, 1930, § 2101; Laws, 1942, § 1835; Laws, 2007, ch. 495, § 2, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment substituted “justice court judge” for “justice of the peace” following “justice” in the first sentence; and added the last sentence.

**Cross References** — Definition of term “felony,” see § 1-3-11.

Acquittal or conviction by justice of the peace of misdemeanor not barring prosecution for felony in same matter, see § 99-11-35.

Power of conservator of peace to bind over persons charged with crimes and offenses to circuit court, see § 99-15-3.

**JUDICIAL DECISIONS**

**1. In general.**

Where a defendant is charged with an assault and battery and it appears that the death of the injured party resulted from defendant's blows, it is not improper but wise for the magistrate to bind the defendant over to await the action of the grand jury. *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901).

The affidavit charging an offense serves to procure the arrest of the accused and if the justice believe him guilty of a felony, he must bind him over and the mittimus will be valid although the affidavit only charge a misdemeanor. *Ex parte Burke*, 58 Miss. 50 (1880).

**ATTORNEY GENERAL OPINIONS**

While county court has concurrent jurisdiction over criminal cases that are filed in justice court, there is a specific provision to transfer a case from justice court to county court; if the need arises, a

criminal case may be dismissed from justice court prior to trial and then refiled in county court. *Bush*, Oct. 25, 2002, A.G. Op. #02-0614.



**§ 99-33-15. Authority to sentence misdemeanor to imprisonment on weekends or other nonworking hours.**

Upon conviction of any person of a misdemeanor in a justice court of this state, the justice court judge shall be authorized, in his discretion, to sentence such person to:

- (a) A period of time in jail to be served either on weekends only;
- (b) Other periods of time during the week wherein such offender may not be engaged in gainful employment; or
- (c) A specified number of days in jail with a provision for the release of such offender for the purpose of engaging in gainful employment at such times as the offender is actually gainfully employed, whether self-employed or otherwise.

In addition, the court may, in its discretion, sentence any convicted person to split periods of incarceration in lieu of serving the sentence of imprisonment all in one (1) period.

**SOURCES:** Laws, 1986, ch. 373, eff from and after July 1, 1986.

**Cross References** — Intermittent sentences for conviction of misdemeanor by municipal court, see § 21-23-20.

**RESEARCH REFERENCES**

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 791 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 1995 et seq.

**§ 99-33-17. Transfer of criminal case from justice court to municipal court in case of conflict.**

A justice court judge shall not dismiss a criminal case but may transfer the case to a municipal court within the county if the justice court judge is prohibited from presiding over the case by the Canons of Judicial Conduct and provided that venue and jurisdiction is proper in the municipal court. Upon transfer of any such case, the justice court judge shall give the justice court clerk a written order to transmit the affidavit or complaint and all other records and evidence in the court's possession to the municipal court by certified mail or to instruct the arresting officer to deliver such documents and records to the municipal court. There shall be no court costs charged for the transfer of the case to the municipal court.

**SOURCES:** Laws, 1991, ch. 322, § 2, eff from and after July 1, 1991.

**Cross References** — Authority of municipal court judge to transfer criminal case to justice court, see § 21-23-7.

ATTORNEY GENERAL OPINIONS

While county court has concurrent jurisdiction over criminal cases that are filed in justice court, there is a specific provision to transfer a case from justice court to county court; if the need arises, a

criminal case may be dismissed from justice court prior to trial and then refiled in county court. Bush, Oct. 25, 2002, A.G. Op. #02-0614.

## CHAPTER 35

### Appeals

Article 1.	Appeals to Circuit Courts .....	99-35-1
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#### ARTICLE 1.

#### APPEALS TO CIRCUIT COURTS.

##### SEC.

99-35-1.	Right of appeal; requirement to post bond; trial de novo on appeal.
99-35-3.	Appearance bond.
99-35-5.	Sheriff empowered to take appeal bond from misdemeanor convicted in justice court.
99-35-7.	Appeals without bond or supersedeas.
99-35-9.	Papers to be transmitted to circuit court clerk.
99-35-11.	Amendment of affidavit, pleading, or proceedings.
99-35-13.	Remittance of fines and forfeitures.

### **§ 99-35-1. Right of appeal; requirement to post bond; trial de novo on appeal.**

In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice court, or by a municipal court, for the violation of an ordinance thereof, an appeal may be taken within forty (40) days from the date of such judgment of conviction to the county court of the county, in counties in which a county court is in existence, or the circuit court of the county, in counties in which a county court is not in existence, which shall stay the judgment appealed from. Any person appealing a judgment of a justice court or a municipal court under this section shall post bond for court costs relating to such appeal. The amount of such bond shall be determined by the justice court judge or municipal judge, payable to the state in an amount of not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00).

On appearance of the appellant in the circuit court the case shall be tried anew and disposed of as other cases pending therein.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 14(4); 1857, ch. 58, art. 23; 1871, § 1335; 1880, § 2355; 1892, § 86; Laws, 1906, § 87; Hemingway's 1917, § 69; Laws, 1930, § 68; Laws, 1942, § 1202; Laws, 1956, ch. 216; Laws, 1968, ch. 308, § 1; Laws, 1988, ch. 416, § 1; Laws, 1989, ch. 403, § 1, eff from and after July 1, 1989.

**Cross References** — Appeals in civil cases generally, see §§ 11-51-3 et seq.

Criminal practice in justice of the peace courts, see §§ 99-33-1 et seq.

Appearance bond, see § 99-35-3.

Remittance of fines and forfeitures, see § 99-35-13.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.



Appeals in civil cases generally, see §§ 11-51-3 et seq.

Appeals as of right, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 12.02 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Jurisdiction of circuit court.
3. Irregularities or omissions in record, effect.
4. Persons entitled to appeal.
5. —Plea of guilty, effect.
6. Time for appeal.
7. Effect of appeal.
8. Questions for review.
9. Proceedings on appeal.
10. —Amendment.
11. —Evidence.
12. —Judgment.
13. Dismissal of appeal.

### 1. In general.

Although there may not have been a signed judgment on record in justice court at that time, any defect in the judgment of the justice court was harmless because defendant appealed and received a jury trial *de novo* in circuit court. *Stidham v. State*, 750 So. 2d 1238 (Miss. 1999).

A circuit court has no authority to judicially create a right of appeal from an administrative agency in the absence of clear statutory authority therefor. *Bickham v. Department of Mental Health*, 592 So. 2d 96 (Miss. 1991).

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trials in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

A petition for removal of a state case to federal district court, filed after appeal from a conviction in a police court and before a *de novo* trial in the circuit court, was filed before trial within the meaning of 28 USC § 1446(c). *Calhoun v. City of Meridian*, 355 F.2d 209 (5th Cir. 1966).

Appeals from justices' courts to the circuit court in criminal cases are governed

by this section [Code 1942, § 1202], authorizing such appeals upon the execution of a bond to appear at "the next term of the circuit court," meaning the term of said court next after the appeal is granted. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

If a justice enters his judgment on a loose piece of paper and after adjournment transfers the entry to a docket, the judgment is not invalid. *Holley v. State*, 74 Miss. 878, 21 So. 923 (1897).

A petition for habeas corpus complaining that relator had not been allowed to appeal from the judgment of a justice, but was wrongfully deprived of his liberty, must show that such an appeal was sought and that sufficient bond was tendered. *Ex parte Gibson*, 12 So. 209 (Miss. 1892).

### 2. Jurisdiction of circuit court.

Circuit court erred in issuing a writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary and appeals from the justice court to the circuit court required a trial *de novo*, Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence, and the grant of the writ of mandamus was in error pursuant to Miss. Code Ann. § 11-41-1. *In re Chisolm*, 837 So. 2d 183 (Miss. 2003).

There is no statute authorizing an appeal from anything other than a final order of the Workers' Compensation Commission, and therefore a circuit court may not grant an appeal from an interlocutory order of the Commission. Thus, judgments of circuit courts emanating from appeals from interlocutory orders of the Commis-

sion were nullities. *Bickham v. Department of Mental Health*, 592 So. 2d 96 (Miss. 1991).

The provisions of § 99-19-3 for the conviction of a person upon "a confession of his guilt in open court or by admitting the truth of the charge against him" apply only when the confession or admission is made to the charge for which the defendant is then being tried. Thus, in a prosecution of two defendants under this section for spotlighting deer following their conviction in a justice of the peace court, the circuit court erred in convicting them of unlawfully hunting from a public road based upon admissions or confessions made during trial where the only offense for which they were on trial was that of spotlighting deer. *Sanchez v. State*, 385 So. 2d 624 (Miss. 1980).

Filing of an appeal transcript in circuit court then in session did not confer authority on that court to dispose of the case until its next term where the bond conditioned the defendant's appearance before the circuit court at the next term after the appeal should be taken. *Ball v. State*, 202 Miss. 405, 32 So. 2d 195 (1947).

Where prosecution originated in justice court, record should show judgment imposing sentence which is required to confer jurisdiction on circuit court on appeal. *Gilmer v. State*, 157 Miss. 622, 128 So. 773 (1930).

Circuit court has no jurisdiction of prosecuting witness taxed with cost. *Town of Lumberton v. Peyton*, 143 Miss. 777, 109 So. 740 (1926).

Transcript of the proceedings before the justice of the peace is essential to the jurisdiction of the circuit court. *Dorsey v. State*, 141 Miss. 600, 106 So. 827 (1926).

Where a justice of the peace had no jurisdiction to try misdemeanor, the circuit court had no power on appeal to try it, and the question of jurisdiction may be raised at any time. *Ivy v. State*, 141 Miss. 877, 106 So. 111 (1925).

Circuit court has no original jurisdiction to try misdemeanor, except by indictment of a grand jury, and where no indictment is shown in the record, but an affidavit, and no trial in the justice court, with proper appeal proceedings, conviction will be reversed. *Young v. State*, 140 Miss. 165, 105 So. 461 (1925).

Justice of the peace has no authority to waive trial for misdemeanor and bind the defendant over to await action of grand jury, unless the charge preferred may be punished as a felony under certain conditions. *Young v. State*, 140 Miss. 165, 105 So. 461 (1925).

On appeal, state must prove misdemeanor committed within jurisdiction of justice of peace who tried case. *Slaton v. State*, 134 Miss. 419, 98 So. 838 (1924); *Crosby v. State*, 136 Miss. 305, 101 So. 437 (1924).

### 3. Irregularities or omissions in record, effect.

Failure of justice to properly enter a judgment rendered by him in a bastardy proceeding, discharging defendant, is a mere irregularity of which defendant cannot complain in the circuit court. *Crum v. Brock*, 136 Miss. 858, 101 So. 704 (1924).

A defendant upon appeal to the circuit court cannot dismiss the prosecution because of irregularity in its transfer by the mayor before whom the affidavit was made to the justice of the peace who tried him, or because of the want of an order on the mayor's docket making such transfer. *Holley v. State*, 74 Miss. 878, 21 So. 923 (1897).

### 4. Persons entitled to appeal.

A person who has been convicted in a justice of the peace or police court has a right to be heard in the circuit court, although such judgment may have been executed. *Little v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

One convicted of unlawful possession of intoxicating liquor, whose sentence was suspended during good behavior on payment of \$50, was, on a subsequent revocation of his suspension, entitled to appeal from the judgment in the police justice court, notwithstanding the payment of \$50 on the fine there imposed. *Little v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail under Code 1906, § 3427 may appeal to the circuit court. *Jones v. State*, 70 Miss. 398, 12 So. 710 (1893).

### 5. —Plea of guilty, effect.

A plea of guilty and payment of the fine and costs imposed in justice of the peace



court does not bar the defendant from taking an appeal to circuit court and there having a trial de novo. *Ball v. State*, 202 Miss. 405, 32 So. 2d 195 (1947).

An appeal may be had to the circuit court, or to the county court where there is one, and a trial there had de novo from a conviction in the court of a justice of the peace or police justice, even though the defendant may there have pleaded guilty. *Little v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

The accused is not barred from appealing by having pleaded guilty. *Neblett v. State*, 75 Miss. 105, 21 So. 799 (1897); *Jenkins v. State*, 96 Miss. 461, 50 So. 495 (1909).

## 6. Time for appeal.

Circuit court did not err in dismissing defendant's appeal as untimely where, although Miss. Code Ann. § 99-35-1 allowed a person adjudged guilty of a criminal offense by a justice court to appeal to circuit court within forty days of such judgment of conviction, Miss. Unif. Cir. & County Ct. Prac. R. 12.02A allowed only thirty days for an appeal; any statute that conflicted with a rule established by the Supreme Court was void, and Rule 12.02A took precedence. *Murray v. State*, 870 So. 2d 1182 (Miss. 2004).

Neither this section nor [former] Rule 7.03, Miss. Unif. Crim. R. Cir. Ct. Prac. require a defendant to file an appeal bond within 40 days of conviction for an appeal from a municipal court to a circuit court, as neither specifies a time frame in which a defendant is required to post a bond; thus, a defendant's filing of an appeal bond 43 days after his conviction was not untimely. *Sanchez v. City of Picayune*, 656 So. 2d 92 (Miss. 1995).

An appeal to the circuit court by a defendant who was convicted in municipal court of driving while intoxicated was properly dismissed where the notice of appeal and appeal bond were filed one day after the running of the 40-day time limit, in spite of the defendant's argument that there was no prejudice to the state of Mississippi or any other party by the delay in the filing of the notice of appeal and appeal bond; to appeal from a municipal court to the circuit court in a criminal case, the appeal must be brought within

40 days of the entry of judgment against the defendant. *Wheat v. City of Picayune*, 631 So. 2d 141 (Miss. 1994).

An appeal to the circuit court can be prosecuted at any time after conviction, even though the prisoner be in the hands of the convict contractor. *Smith v. Boykin*, 61 Miss. 110 (1883).

## 7. Effect of appeal.

Prosecution of defendant for felony manslaughter following his invocation of statutory right to trial de novo appeal of misdemeanor convictions violated due process where felony prosecution was based on same conduct as misdemeanor convictions. *Thigpen v. Roberts*, 468 U.S. 27, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984).

One appealing a conviction from the justice court to the circuit court stands there for trial de novo as defendant and occupies in that court the same attitude of a defendant as he did in the justice court and as such has no right to dismiss the appeal with procedendo. *Thigpen v. State*, 206 Miss. 87, 39 So. 2d 768 (1949).

The appeal supersedes, but does not vacate the judgment of the justice. *Ex parte Caldwell*, 62 Miss. 774 (1885).

## 8. Questions for review.

Question of justice's qualification must be presented in justice's court when such question is raised therein to be considered on appeal to circuit court. *Arnold v. State*, 149 Miss. 738, 115 So. 885 (1928).

## 9. Proceedings on appeal.

In a prosecution for driving under the influence, enhanced 9-month sentences received by the defendants after they sought a trial de novo in the circuit court were not improper, even though the defendants were originally tried and sentenced in municipal court under § 21-13-19 which provides for a maximum penalty of 6 months' incarceration; when the defendants filed their appeals for trial de novo in the circuit court, they took the chance that the penalties would be greater than allowed by § 21-13-19 since the actions were brought under § 63-11-30(1)(c). *Fisher v. City of Eupora*, 587 So. 2d 878 (Miss. 1991).

Defendant who appeals to Circuit Court from Justice Court conviction and sen-



tence of fine of \$269.50 and imprisonment of 90 days in county jail, with jail sentence suspended for one year, and who is again convicted in Circuit Court, may be sentenced by Circuit Court to pay fine of \$350 and to serve 6 months in county jail, with 5 ½ months of jail sentence suspended. *Smith v. State*, 463 So. 2d 1033 (Miss. 1984).

Where accused did not appear at a time set by the circuit court for trial of his appeal from justice of the peace court, he failed to prosecute his appeal and had no right to demand that the circuit court pass upon the question of guilt. *Murphy v. State*, 223 Miss. 290, 78 So. 2d 342 (1955).

On appeal to the circuit court, the latter does not ordinarily sit as a court of review merely, but the appeal supersedes the judgment of the court of the justice of the peace, and the case becomes triable in the circuit court de novo. *Ball v. State*, 202 Miss. 405, 32 So. 2d 195 (1947).

Criminal case, in which justice was disqualified because of interest, must, on appeal to county court, be tried de novo. *State v. Dearman*, 152 Miss. 6, 118 So. 349 (1928).

Trial in circuit court on appeal from justice of peace corrected all errors committed by justice, either as to ruling of law or ruling on facts. *Hitt v. State*, 149 Miss. 718, 115 So. 879 (1928); *Foot v. State*, 115 So. 886 (Miss. 1928); *Jones v. State*, 115 So. 886 (Miss. 1928).

Accused's right to trial in circuit court cannot be affected by what was done in the justice court, nor can any motion made in the circuit court deprive him of a right to trial therein on the merits. *Payne v. State*, 101 Miss. 588, 58 So. 532 (1912).

#### 10. —Amendment.

Code 1942, § 1202 clearly permits criminal affidavits which were originally filed in the justice of the peace court to be amended in the circuit court. *Jones v. State*, 268 So. 2d 348 (Miss. 1972).

In a prosecution on a charge of trespass on land, the affidavit of the complainant, which failed to describe the land, was at most only defective and not void, and might be amended by the furnishing of an accurate description of the land. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

An affidavit, charging a misdemeanor before a justice of the peace, may, on appeal to the circuit court, be amended so as to charge the offense intended to be charged in the affidavit. *Moran v. State*, 137 Miss. 435, 102 So. 388 (1925).

Affidavit charging no offense held amendable in circuit court on appeal from conviction in mayor's court, to properly charge offense. *City of Pascagoula v. Seymour*, 136 Miss. 502, 101 So. 576 (1924).

A judgment of conviction in the circuit court on appeal from a justice of the peace cannot be enlarged by amendment after the expiration of the term so as to include a recovery against the sureties on the appeal-bond. *Barber v. City of Biloxi*, 76 Miss. 578, 25 So. 298 (1899).

On appeal the affidavit, if defective, may be amended, and the charge as amended need not be sworn to by anyone. *Coulter v. State*, 75 Miss. 356, 22 So. 872 (1898).

Where a defendant was convicted of unlawful retailing upon an affidavit charging certain sales to certain persons named therein, though the names of such persons were unnecessary, on appeal the court cannot strike out the names and prove a sale to a different person, as they became a part of the description of the offense. *Hudson v. State*, 73 Miss. 784, 19 So. 965 (1896).

An affidavit stating an imperfect venue is amendable under this section [Code 1942, § 1202] and objection to it must be made before the jury is empanelled. *Burnett v. State*, 72 Miss. 994, 18 So. 432 (1895).

#### 11. —Evidence.

Findings by a trial judge that a defendant confessed voluntarily and that such confession is admissible are findings of fact. Such findings are treated as findings of fact made by a trial judge sitting without a jury as in any other context. As long as the trial judge applies the correct legal standards, his or her decision will not be reversed on appeal unless it is manifestly in error or in contrary to the overwhelming weight of the evidence. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

Record certified to circuit court on appeal from justice's court, including copy of judgment of justice, is competent evidence in circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808 (1925).

Defendant appealed from conviction in justice court for unlawful sale of liquors under two affidavits charging sales on April 8 and 10, held that on trial in circuit court on affidavit of April 10 objection to evidence of sales for two years prior thereto was properly overruled. *Wilson v. State*, 113 Miss. 748, 74 So. 657 (1917).

## 12. —Judgment.

Circuit court's judgment dismissing appeal from justice court, held erroneous for failure to show defendant's opportunity to prosecute appeal. *Ingram v. State*, 136 Miss. 291, 101 So. 380 (1924).

## 13. Dismissal of appeal.

The circuit court abused its discretion in refusing to set aside an order of dismissal and for a writ of procedendo where a defendant convicted in the municipal court of disturbing the peace had timely perfected her appeal to the July 1978 Term and had met the calling of the docket at each subsequent term thereafter until January 26, 1981, which was the first day of the regular January 1981 Term of the court, at which time the defendant had been ill and where, having learned that the writ of procedendo had been ordered, she timely filed a motion to have the order set aside. *Sartain v. State*, 406 So. 2d 43 (Miss. 1981).

Where the accused, appealing from a conviction in justice of the peace court of

unlawful possession of liquor, requested the circuit court to continue his case so he could prepare and the court granted a one-half day continuance but the accused did not appear to the time set, the court properly dismissed the appeal and did not abuse its discretion in overruling the motion to set aside the dismissal of the appeal. *Murphy v. State*, 223 Miss. 290, 78 So. 2d 342 (1955).

One appealing a conviction from the justice court to the circuit court stands there for trial de novo as defendant and occupies in that court the same attitude of a defendant as he did in the justice court and as such has no right to dismiss the appeal with procedendo. *Thigpen v. State*, 206 Miss. 87, 39 So. 2d 768 (1949).

Where at time appeal from conviction was perfected from municipal court to circuit court, no special term of circuit court had been ordered, appeal was returnable to next regular term, and when return day has been so fixed cause was not triable at special term and court was without authority to dismiss appeal at special term. *Gortney v. City of New Albany*, 171 Miss. 896, 158 So. 921 (1935).

Error to dismiss appeal from conviction in city court, triable de novo, where counsel appearing for defendant unavoidably delayed. *Morris v. Tupelo*, 129 Miss. 887, 93 So. 433 (1922); *Cannon v. State*, 134 Miss. 805, 100 So. 8 (1924).

One who appeals to circuit court from conviction in justice court has no right to have appeal dismissed after evidence for the state has been introduced in the circuit court. *Bang v. State*, 106 Miss. 824, 64 So. 734 (1914).

## ATTORNEY GENERAL OPINIONS

Posting of bond in relation to appeal from criminal conviction of justice court or municipal court is jurisdictional, and a circuit clerk may refuse to accept appeal

from a nonindigent without the posting of a bond. *Mitchell*, Jan. 24, 1992, A.G. Op. #91-0947.

## RESEARCH REFERENCES

**ALR.** Court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error. 64 A.L.R.3d 1226.

radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence-modern cases. 70 A.L.R.4th 664.

Prosecutor's appeal in criminal case to

Abatement of state criminal case by accused's death pending appeal of conviction-modern cases. 80 A.L.R.4th 189.

Failure to appeal denial of double jeopardy claim within time limits of Rule 4, Federal Rules of Appellate Procedure, as precluding review of claim on appeal of conviction at retrial. 51 A.L.R. Fed. 770.

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 77 et seq., 222 et seq.

5 Am. Jur. 2d, Appellate Review §§ 358 et seq., 441, 442.

47 Am. Jur. 2d, Justices of the Peace §§ 48 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2324 et seq.

**Practice References.** Cipes, Bern-

stein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

### § 99-35-3. Appearance bond.

The appellant if sentenced to imprisonment for an offense or to stand committed until his fine and costs shall be paid, may be relieved from such imprisonment or commitment pending his appeal, by giving bond with sufficient resident sureties or one or more guaranty or surety companies authorized to do business in this state, to be approved by the justice court judge or municipal judge, payable to the state in the penalty of not less than One Hundred Dollars (\$100.00), nor more than One Thousand Dollars (\$1,000.00), except for the violation of any of the criminal statutes of Mississippi prohibiting the sale and possession of intoxicating liquors, when the bond shall not be less than One Hundred Fifty Dollars (\$150.00), nor more than One Thousand Dollars (\$1,000.00), to be determined by the justice court judge or municipal judge in reference to the grade of the offense as indicated by the judgment and ability of the appellant to give bond, conditioned to appear before the appellate court at the next term after such appeal shall be taken, to answer to the charge against him, and so to continue until discharged. On default of defendant a forfeiture shall be entered against him and his sureties.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 14(4); 1857, ch. 58, art. 23; 1871, § 1335; 1880, § 2355; 1892, § 86; Laws, 1906, § 87; Hemingway's 1917, § 69; Laws, 1930, § 68; Laws, 1942, § 1202; Laws, 1956, ch. 216; Laws, 1968, ch. 308, § 1; Laws, 1988, ch. 416, § 2, eff from and after July 1, 1988.

**Cross References** — Right of appeal, requirement to post bond, trial de novo on appeal, see § 99-35-1.

Remittance of fines and forfeitures, see § 99-35-13.

Restrictions on who may sign bonds, see Miss. Unif. Cir. & County Ct. Prac. R. 1.07.

Bond and appearance, see Miss. Unif. Cir. & County Ct. Prac. R. 5.09.



## JUDICIAL DECISIONS

**1. In general.**

A criminal defendant who duly noticed his appeal to the Circuit Court was entitled to a hearing and an opportunity to correct any deficiencies in his appearance bond where the bond, though imperfect, was filed and approved by the Justice Court judge. *Dixon v. State*, 528 So. 2d 832 (Miss. 1988).

Filing of an appeal transcript in circuit court then in session did not confer authority on that court to dispose of the case until its next term where the bond conditioned the defendant's appearance before the circuit court at the next term after the appeal should be taken. *Ball v. State*, 202 Miss. 405, 32 So. 2d 195 (1947).

Bond must be executed before appeal allowed to circuit court; defendant seeking to prove bond executed must tender new bond and must file affidavit setting out a substantial copy of original bond before parol proof of its execution can be re-

ceived. *Polk v. Town of Seminary*, 89 Miss. 293, 42 So. 129 (1906).

A bond conditioned as a bond on appeal in a civil case cannot be made to operate as an appeal bond in a criminal case. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

Appeals from justices' courts to the circuit court in criminal cases are governed by this section [Code 1942, § 1202], authorizing such appeals upon the execution of a bond to appear at "the next term of the circuit court," meaning the term of said court next after the appeal is granted. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

A petition for habeas corpus complaining that relator had not been allowed to appeal from the judgment of a justice, but was wrongfully deprived of his liberty, must show that such an appeal was sought and that sufficient bond was tendered. *Ex parte Gibson*, 12 So. 209 (Miss. 1892).

## RESEARCH REFERENCES

**ALR.** Abatement of state criminal case by accused's death pending appeal of conviction-modern cases. 80 A.L.R.4th 189.

**Am Jur.** 47 Am. Jur. 2d, Justices of the Peace §§ 62 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 401 et seq. (form, amount, approval, or waiver of security in lower court).

## § 99-35-5. Sheriff empowered to take appeal bond from misdemeanor convicted in justice court.

The sheriff of any county is empowered and directed to take an appeal bond in any case of a conviction of a misdemeanor before a justice of the peace of his county, and upon the prisoner or his attorney furnishing a valid appeal bond, and the sheriff taking and approving the same, he shall discharge the appellant from custody, turn over the bond to the circuit clerk and notify the justice of the peace that an appeal has been taken and direct him to send up all papers to the next term of the circuit court in the same manner as if the appeal bond had been filed with the justice from whose judgment the appeal was taken. Nothing in this section shall prevent a justice of the peace from accepting and receiving appeal bonds as provided by law, but the sheriff shall have power concurrent with the justice of the peace of their counties in all matters pertaining to the taking of appeal bonds in similar cases.

**SOURCES:** Codes, Hemingway's 1917, § 67; Laws, 1930, § 70; Laws, 1942, § 1204; Laws, 1908, ch. 137.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Duty of sheriff with respect to bail bond, see §§ 99-5-7, 99-5-15, 99-5-17.

Prosecutions before justice court, judge generally, see §§ 99-33-1 et seq.

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Justices of the Peace §§ 62 et seq.

### § 99-35-7. Appeals without bond or supersedeas.

Any person who shall have been convicted of a criminal offense against the laws of this state, by the judgment of a justice court, or by a municipal court for the violation of an ordinance of the municipality, who by reason of his poverty is not able to give bond as prescribed in Section 99-35-3, may nevertheless appeal from such conviction on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment, nor discharge the appellant from custody, but the judgment shall be executed as if an appeal had not been taken, unless the presiding judge of the appellate court shall, for good reason, see fit to stay the execution of the judgment rendered by the court below by ordering the release of the defendant on his own recognizance, and this shall not affect the trial of the case anew in the appellate court.

**SOURCES:** Codes, 1880, § 2356; 1892, § 87; Laws, 1906, § 88; Hemingway's 1917, § 70; Laws, 1930, § 69; Laws, 1942, § 1203; Laws, 1938, ch. 273; Laws, 1988, ch. 416, § 3, eff from and after July 1, 1988.

**Cross References** — Justice courts generally, see §§ 9-11-2 et seq.

Written demand for appeal from judgment of justice of the peace in lieu of bond, see § 11-51-103.

Affidavit to establish poverty in civil suit, see § 11-53-17.

Appearance bond, see § 99-35-3.

Appeals to supreme court without bonds by criminal indigents, see § 99-35-105.

Appeal bonds, see Unif. Cir. & County Ct. Prac. R. 12.02.

## JUDICIAL DECISIONS

### 1. In general.

In view of this provision, one convicted in a state court is not excused by inability to pay the cost of exhausting state remedies from doing so before seeking a federal writ of habeas corpus. Application of Wyckoff, 196 F. Supp. 515 (S.D. Miss. 1961).

Under this section [Code 1942, § 1203],

an appeal by one convicted of a misdemeanor before a justice of the peace supercedes but does not vacate the judgment; and if such appeal should be dismissed for want of prosecution, that fact should be certified to the justice of the peace, who should then enforce his judgment. *Ex parte Caldwell*, 62 Miss. 774 (1885).

# RESEARCH REFERENCES

**ALR.** Abatement of state criminal case by accused's death pending appeal of conviction-modern cases. 80 A.L.R.4th 189.

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 436 et seq., 477 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 481-485 (inability to give security).

**CJS.** 4 C.J.S., Appeal and Error §§ 322 et seq.

## § 99-35-9. Papers to be transmitted to circuit court clerk.

The clerk of the justice court or municipal court from which judgment convicting of a criminal offense an appeal shall be taken shall at once transmit to the clerk of the circuit court the bond taken and a certified copy of the record of the case, with all the original papers in the case, as in appeals in civil cases. If an appeal be taken from a judgment convicting of a criminal offense, during a session of the circuit court of the county, the transcript and papers shall be returned to, and the case triable at that term of the court, and the bond shall bind the defendant accordingly, and the clerk of the circuit court shall docket the case on the state docket, and shall be entitled to like fees as in other cases. The judge setting the bond shall be liable for the amount of the bond, if he fails to require a good and sufficient one. The clerk of the justice court or municipal court shall make up the transcript of the record and transmit the same to the circuit clerk within ten (10) days after the appeal bond is given.

**SOURCES:** Codes, 1880, § 2357; 1892, § 88; Laws, 1906, § 89; Hemingway's 1917, § 71; Laws, 1930, § 71; Laws, 1942, § 1205; Laws, 1981, ch. 471, § 57; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Cross References** — Form of record transmitted from justice of the peace, see § 11-51-87.

Transmittal of record from inferior tribunals in civil cases, see § 11-51-89.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

# JUDICIAL DECISIONS

## I. UNDER CURRENT LAW.

1. In general.
- 2.-10. [Reserved for future use.]

## II. UNDER FORMER § 99-35-121.

11. In general.

## I. UNDER CURRENT LAW.

### 1. In general.

Where prosecution originated in justice court, record should show judgment im-

posing sentence which is required to confer jurisdiction on circuit court on appeal. *Gilmer v. State*, 157 Miss. 622, 128 So. 773 (1930).

Transcript of record of justice court, with certificate that all original papers were contained therein, held sufficient. *Raines v. State*, 148 Miss. 70, 114 So. 125 (1927).

Circuit court is without jurisdiction of appeal from justice court in absence of properly certified record. *Salers v. State*,



142 Miss. 88, 107 So. 375 (1926); *Jeffries v. State*, 146 Miss. 467, 111 So. 576 (1927).

Circuit court on appeal from justice of peace was without jurisdiction, there being no transcript of proceedings in justice court, but merely a certificate that defendant was convicted. *Galloway v. State*, 144 Miss. 696, 110 So. 665 (1926).

The point that on appeal from justice to circuit court there was no transcript of proceedings in justice court may be raised for first time on appeal from circuit court. *Galloway v. State*, 144 Miss. 696, 110 So. 665 (1926).

The circuit court has no jurisdiction of prosecution for assault and battery, where record does not disclose judgment of justice of peace or certificate or transcript, as required by this section [Code 1942, § 1205]. *Cook v. State*, 144 Miss. 519, 110 So. 443 (1926).

Jurisdiction did not attach where justice of the peace failed to attach certificate of record. *Gardner v. State*, 145 Miss. 210, 110 So. 588 (1926).

Where record shows that circuit court did not have jurisdiction on account of absence of transcript of the proceedings in justice court, but that since trial, such transcript had been filed, this court must reverse and remand the case for new trial. *Salers v. State*, 142 Miss. 88, 107 So. 375 (1926).

On certification by justice of peace of the original affidavit charging a misdemeanor, judgment and appeal bond, but not docket entries, circuit court acquired jurisdiction of the appeal. *Borders v. State*, 138 Miss. 788, 104 So. 145 (1925).

The record of which the justice is to transmit a copy is his docket entries and judgments. *Hughston v. Cornish*, 59 Miss. 372 (1882).

## 2-10. [Reserved for future use.]

### II. UNDER FORMER § 99-35-121.

#### 11. In general.

Counsel must take notice that clerk is required to send appeal to supreme court where cause will be docketed, and, if record is not in supreme court on return day, and stenographer has not had requisite time allowed by law in which to file his notes, that fact should be suggested to court, and, if stenographer does not file notes within time allowed by law, counsel should take appropriate steps before circuit court or judge to compel filing of notes, and make motion in supreme court that case be passed until notes can be obtained and record filed. Also, if stenographer does not file notes within time allowed by law, appellant should prepare bill of exceptions containing substance of notes and present it to circuit judge for approval, giving notice thereof to opposing counsel of hearing before judge. *Warren v. State*, 165 Miss. 783, 144 So. 698 (1932), overruled on other grounds, *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975).

Giving stenographer notice to transcribe and file notes does not relieve appellant's attorney from further duty until notice of filing is received. *Warren v. State*, 165 Miss. 783, 144 So. 698 (1932), overruled on other grounds, *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975).

Motion to reinstate appeal dismissed for want of prosecution was overruled for failure of motion to show diligence to secure stenographer's transcribed notes. *Warren v. State*, 165 Miss. 783, 144 So. 698 (1932), overruled on other grounds, *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975).

### RESEARCH REFERENCES

**ALR.** Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal. 66 A.L.R.3d 954.

Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings. 67 A.L.R.3d 1013.

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 484 et seq.

47 Am. Jur. 2d, Justices of the Peace §§ 62 et seq.

**CJS.** 4 C.J.S., Appeal and Error §§ 440 et seq.

## § 99-35-11. Amendment of affidavit, pleading, or proceedings.

When an appeal is presented to the circuit court in any criminal case from the judgment or sentence of a justice of the peace or municipal court, it shall be permissible, on application of the state or party prosecuting, to amend the affidavit, pleading, or proceedings at any time before a verdict so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amendment to be made on such terms as the court may consider proper.

**SOURCES:** Codes, 1892, § 1438; Laws, 1906, § 1511; Hemingway's 1917, § 1269; Laws, 1930, § 1292; Laws, 1942, § 2535; Laws, 1886, p. 85.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Amendment of indictment or information in case of dilatory plea, see § 99-7-19.

Amendment of indictment where name of unknown defendant becomes known, see § 99-7-25.

Amendment of indictment where variance appears between statement in indictment and evidence offered in proof, see § 99-17-13.

Prosecutions before justice court judges generally, see §§ 99-33-1 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Particular offenses.

#### 1. In general.

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trial in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

This section [Code 1942, § 2535] which refers to the amendment of affidavits, contains no requirement that an order allowing such amendment should be spread upon the minutes as in the case of indictments. *Holloway v. State*, 52 So. 2d 492 (Miss. 1951).

Provision that objections to indictment for defect on face must be taken by a demurrer applies to prosecution based on affidavit; affidavit not demurred to for defect on face will be treated as sufficient; defect on face of affidavit may be amended

in circuit court on appeal. *Sullivan v. State*, 150 Miss. 542, 117 So. 374 (1928).

However in an appeal from a mayor's court the transcript of the record cannot be supplied by the oral testimony of the mayor. *Washington v. State*, 93 Miss. 270, 46 So. 539 (1908).

A missing affidavit in an appeal from the city court may be supplied by oral proof on the trial. *Winfield v. City of Jackson*, 89 Miss. 272, 42 So. 183 (1906).

A defective affidavit on which the defendant has been convicted by a magistrate can be amended in the circuit court under this section [Code 1942, § 2535]. *Triplet v. State*, 80 Miss. 379, 31 So. 743 (1902); *Brown v. State*, 81 Miss. 137, 32 So. 952 (1902).

Under this section [Code 1942, § 2535] an affidavit defective before a justice of the peace may be amended on appeal to the circuit court without being sworn to anew. *Coulter v. State*, 75 Miss. 356, 22 So. 872 (1898).

#### 2. Particular offenses.

Where an affidavit charged the defendant did wilfully and unlawfully sell one-half pint of liquor and it was amended to

charge defendant with unlawful sale of intoxicating liquor, the affidavit sufficiently indicated the offense intended to be charged and the defect was on the face of it, it was amendable and the failure to demur to it constituted a waiver of defect. *Perciful v. Holley*, 217 Miss. 203, 63 So. 2d 817 (1953).

Where defendant was convicted in justice court under an affidavit charging him with contributing to delinquency of his minor son by permitting and using the son to aid in loading and distributing intoxicating liquors, and defendant appealed to circuit court, amendment of affidavit charging defendant contributing to delinquency of son also by knowingly and intentionally permitting son to be present while defendant was loading intoxicating liquors was allowed, since the essential charge was the same in the affidavit and the amendment. *Mays v. State*, 216 Miss. 631, 63 So. 2d 110 (1953).

In prosecution for unlawful possession of intoxicating liquor, it was proper to permit amendment of affidavit for search warrant to show correct date of making thereof before justice of the peace. *Simmons v. State*, 179 Miss. 713, 176 So. 726 (1937).

In prosecution for unlawful possession of intoxicating liquor, amendment of affidavit so as to charge that accused "wilfully and unlawfully" had in his possession intoxicating liquor was authorized by statute governing amendment of affidavit on appeal from justice of the peace. *Patterson v. State*, 179 Miss. 758, 176 So. 603 (1937).

Where trial of prosecution for unlawful possession of intoxicating liquor was had on affidavit which failed to charge as required by statute that the offense was committed contrary to the ordinance of the municipality, supreme court was authorized to reverse and remand the prosecution, so that the affidavit might be amended accordingly. *Wilson v. City of Aberdeen*, 179 Miss. 751, 176 So. 601 (1937).

Action of circuit court on appeal from conviction for unlawful possession of intoxicating liquor in a justice court in permitting amendments to be made to affidavit so as to state the name of defendant in making it conform to the affidavit for search warrant, and the search warrant for search and seizure, by inserting in the affidavit the words "did unlawfully," held authorized by statute. *Wilson v. City of Aberdeen*, 179 Miss. 751, 176 So. 601 (1937).

Action of circuit court on appeal from conviction for the unlawful possession of intoxicating liquor in a justice court in permitting an amendment of the affidavit to show that the offense was committed in violation of a municipal ordinance as authorized by the statute. *Wilson v. City of Aberdeen*, 179 Miss. 751, 176 So. 601 (1937).

A case where the affidavit alleged in charging larceny before a justice of the peace that the ownership of the property was in Forest Willis and in the circuit court the proof showed the ownership to be in three other persons an amendment was permitted in the affidavit so as to bring the merits of the case to trial on the charge attempted to be set out in the original affidavit. *Cannon v. State*, 140 Miss. 217, 105 So. 501 (1925).

In the prosecution for the malicious shooting of a horse in which the affidavit did not give the name or description of the horse but alleged ownership in one person it was error to amend the affidavit by alleging ownership in another person. *White v. State*, 95 Miss. 75, 48 So. 611 (1909).

Where a defendant has been convicted before a magistrate of unlawful retailing, the affidavit charging the sale to certain named persons, such names though unnecessary primarily become thereby a part of the description of the offense and on appeal to the circuit court cannot be stricken out so that a sale to a different person may be proved. *Hudson v. State*, 73 Miss. 784, 19 So. 965 (1896).

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Justices of the Peace §§ 62 et seq.



## § 99-35-13. Remittance of fines and forfeitures.

In the event there is an acquittal or the case is nolle prosequi, the order of the court shall direct that any fine or forfeiture paid in the lower court be remitted, and a certified copy of the said order shall be sufficient authority for the remittance of said fine or forfeiture by the board of supervisors in the event the case was appealed from a judgment of a justice of the peace, or by the governing authorities of a municipality in the event the case was appealed from a judgment of a mayor or police justice of a city, town or village.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 14(4); 1857, ch. 58, art. 23; 1871, § 1335; 1880, § 2355; 1892, § 86; Laws, 1906, § 87; Hemingway's 1917, § 69; Laws, 1930, § 68; Laws, 1942, § 1202; Laws, 1956, ch. 216; Laws, 1968, ch. 308, § 1, eff from and after passage (approved June 27, 1968).

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Right of appeal, requirement to post bond, trial de novo on appeal, see § 99-35-1.

Appearance bond, see § 99-35-3.

### ARTICLE 3.

#### APPEALS TO SUPREME COURT AND RELATED PROCEDURES.

SEC.	
99-35-101.	Right of appeal.
99-35-103.	When state or municipality may appeal.
99-35-105.	Prepayment of costs; appeal without prepayment; reimbursement of successful appellants.
99-35-107.	Deposit for costs; security for jail fees.
99-35-109.	Bail after conviction of misdemeanor.
99-35-111.	Bail after conviction of misdemeanor; judge may fix amount of bond.
99-35-113.	Failure of appellant on bond to appear in misdemeanor cases.
99-35-115.	Bail after conviction of felony; application for emergency hearing upon denial of bail.
99-35-117.	Bail after conviction of felony; judge to fix amount of bond; judge or sheriff may approve bond.
99-35-119.	Failure of appellant on bond to appear in felony cases.
99-35-121 through 99-35-125.	Repealed.
99-35-127.	Sheriff of Hinds County to receive prisoners; fees.
99-35-129.	Execution of sentence; counsel may prosecute appeal.
99-35-131.	Appellant granted credit for time served in prison pending appeal.
99-35-133.	Repealed.
99-35-135.	Remand and custody of prisoner on affirmance of sentence.
99-35-137.	Copy of death sentence to be delivered to sheriff.
99-35-139.	Prisoner to be delivered to sheriff of proper county if new trial ordered.
99-35-141.	Clerk to notify penitentiary of reversals.
99-35-143.	Errors which are not grounds for reversal.
99-35-145.	Repealed.

## § 99-35-101. Right of appeal.

Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, art. 7(1); 1857, ch. 64, arts. 306, 307; 1871, § 2841; 1880, § 2314; 1892, § 36; Laws, 1906, § 37; Hemingway's 1917, § 12; Laws, 1930, § 16; Laws, 1942, § 1150; Laws, 1914, ch. 151.

**Cross References** — Appeals in civil cases generally, see §§ 11-51-3 et seq.

Appealability of post-conviction finding of circuit court regarding sanity of prisoner sentenced to death, see § 99-19-57.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Oral argument upon appeal to Supreme Court, see Miss. R. App. P. 34.

## JUDICIAL DECISIONS

1. In general.
2. Matters appealable.
3. Appeal by prosecution.
4. Plea of guilty, effect of.
5. Coram nobis.

### 1. In general.

Where defendant did not appeal the sentence imposed following his guilty plea within 30 days of the entry of the order and did not move within 180 days of the order to reopen the appeal, defendant's appeal was procedurally barred, and defendant's proper remedy was post-conviction relief. *Watson v. State*, 841 So. 2d 218 (Miss. Ct. App. 2003).

There is no rule, statute, or constitutional provision which limits the state's right to seek certiorari review of a Court of Appeals decision which reverses a criminal conviction and remands for a new trial. *Cohen v. State*, 732 So. 2d 867 (Miss. 1998).

The state was authorized to appeal the trial court's failure to sentence the defendant to the maximum sentence after he was adjudicated an habitual offender. *Pool v. State*, 724 So. 2d 1044 (Ct. App. 1998).

A defendant desiring an out-of-time appeal must, at the very least, show that the failure to timely perfect an appeal was through no fault of his or her own. Thus, a defendant's application for an out-of-time appeal was properly denied where the

defendant was fully advised of his right to appeal, he understood his right to appeal, and he did nothing indicating that he wished an appeal until well after the time limit had expired; the defendant's sworn waiver of the right to appeal functioned as substantial credible evidence that the defendant received contemporaneous advice regarding his right to appeal and that he knowingly and intelligently waived that right. *Fair v. State*, 571 So. 2d 965 (Miss. 1990).

Although the authority to resentence a misdemeanor could become vested in the Circuit Court only upon its receipt of an appellate mandate, the Circuit Court could enter a resentencing order scheduled to take effect upon receipt of the mandate. *Gardner v. State*, 547 So. 2d 806 (Miss. 1989).

In capital murder prosecutions, as in other cases, the Supreme Court has the authority to affirm a conviction for a lesser included offense while simultaneously reversing as to the greater offense, if the evidence so warrants. *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988).

Although a defendant is entitled to transcripts of prior proceedings in the same case, the state is not required as a matter of course to provide transcripts from related cases. In such a case, the petitioner should be expected to show some specific need or reason for seeking

the transcripts. The bare appearance of possible overlap in evidence should not, ordinarily, be enough. *Fisher v. State*, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

The right to appeal to the Supreme Court afforded to one convicted of a crime is not a common law right, but is strictly a statutory right, and an appeal must be perfected in the manner provided by statute. *State v. Ridinger*, 279 So. 2d 618 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

Supreme court will consider only matters which are properly a part of the record before it, hence papers obtained after adjournment of trial court which are not properly part of the record will not be looked to on appeal. *Craig v. State*, 208 Miss. 528, 44 So. 2d 860 (1950).

## 2. Matters appealable.

Appellate jurisdiction was lacking in defendant's direct appeal from the entry of guilty pleas because defendant's contentions went to whether the plea was obtained involuntarily and in violation of constitutional rights; defendant argued that the circuit court and the district attorney were both motivated by vindictiveness resulting from his successful post-conviction relief attack on his initial guilty plea. *Fowler v. State*, — So. 2d —, 2003 Miss. App. LEXIS 1024 (Miss. Ct. App. Nov. 4, 2003).

This section provides the avenue for direct appeal of a criminal conviction, but it does not permit an appeal from the denial of a motion for a transcript or other records as a separate action in and of itself, though a defendant may raise such a claim within the context of a direct appeal under this statute. *Fleming v. State*, 553 So. 2d 505 (Miss. 1989), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

An order for psychiatric examination of an accused to ascertain his mental capacity to stand trial is not a final judgment so as to be appealable. *Jaquith v. Beckwith*, 248 Miss. 491, 157 So. 2d 403 (1963).

Order revoking suspension of sentence of accused who had pleaded guilty of unlawful possession of intoxicating liquors held not appealable. *Cooper v. State*, 175 Miss. 718, 168 So. 53 (1936). But see *De*

*La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Supreme court is without jurisdiction of appeal in a criminal case which is prosecuted before judgment from a verdict convicting the appellant, and will of its own motion dismiss the same. *Hayden v. State*, 81 Miss. 55, 32 So. 922 (1902).

This section, [Code 1942, § 1150] does not authorize an appeal before sentence or judgment, although there has been a verdict of guilty. *Lemly v. State*, 69 Miss. 628, 12 So. 559 (1892).

## 3. Appeal by prosecution.

Neither this section [Code 1942, § 1150] nor Code 1892, § 39 [Code 1942, § 1153], authorizes an appeal by a municipality from a judgment of the circuit court discharging one arrested for violating a municipal ordinance. *City of Water Valley v. Davis*, 73 Miss. 521, 19 So. 235 (1896).

## 4. Plea of guilty, effect of.

After entering a guilty plea, appellant was sentenced to consecutive four-year sentences for armed robbery and attempted armed robbery; appellant was not entitled to direct review of his sentences because he pled guilty. *Walters v. State*, 933 So. 2d 313 (Miss. Ct. App. 2006).

Record clearly demonstrated that defendant was informed that should he plead guilty to the crime, his plea of guilty would act as a waiver to a direct appeal to the Mississippi Supreme Court pursuant to Miss. Code Ann. § 99-35-101. Further, it could not be said that plea counsel's brief moment of confusion regarding which charges the State would pursue rose to the level of ineffective assistance of counsel and the record clearly indicated that the trial judge explained to defendant the terms of the plea agreement; thus, defendant was not denied either due process or effective assistance of counsel. *Sykes v. State*, 895 So. 2d 191 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief because the inmate's plea was not involuntary as the inmate was advised as to the maximum sentence and the waiver of her right to appeal. *Lee v. State*, 918 So. 2d 87 (Miss. Ct. App. 2006).



In his post-conviction action, it was apparent that petitioner was contesting his conviction rather than the sentence imposed. He failed to assert even one allegation that his sentence was illegal, and since he was challenging his conviction, his only possible relief was a motion for post-conviction relief; he was not misadvised by the trial court that he had no right to appeal upon entering a plea of guilty. *Jennings v. State*, 896 So. 2d 374 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Defendant's appeal was dismissed without prejudice for lack of jurisdiction under Miss. Code Ann. § 99-35-101, which prohibits persons having pleaded guilty to a crime from filing direct appeals to the Mississippi Supreme Court; however, an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself, but although the enhancement of the sentence did pertain to the length of the sentence, the appeal from the enhancement of the sentence was equivalent to an appeal from the guilty plea itself because defendant had pleaded guilty to the crime, and to the enhancement, both of which were set out in the indictment. *Bennett v. State*, 865 So. 2d 1158 (Miss. 2004).

Where a defendant was not attempting to appeal from his guilty plea, but from an alleged illegal sentence, the State's motion to dismiss the appeal for lack of jurisdiction was overruled. *Norwood v. State*, 846 So. 2d 1048 (Miss. Ct. App. 2003).

Where the defendant's appeal amounted to a challenge of his sentence, and not to the validity of his plea of guilty, the appeal was proper. *Campbell v. State*, 743 So. 2d 1050 (Miss. Ct. App. 1999).

A defendant could appeal from the sentence imposed even though he had pleaded guilty to the charges against him. *Trotter v. State*, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

Trial court has exclusive jurisdiction to hear and determine petition for postconviction relief filed by convicted defendant who is precluded from taking direct appeal by virtue of having entered guilty plea. *McDonall v. State*, 465 So. 2d 1077 (Miss. 1985).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of coram nobis. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547 (1961).

Where circuit court had no jurisdiction, plea of guilty had no effect and did not prevent appeal to supreme court. *Bass v. State*, 159 Miss. 132, 131 So. 830 (1931).

### 5. Coram nobis.

The trial court had exclusive jurisdiction to hear and determine defendant's petition for a writ of habeas corpus following his conviction for business burglary, where defendant's conviction and sentence had not been appealed to the Mississippi Supreme Court for affirmance or dismissal. *McDonall v. State*, 465 So. 2d 1077 (Miss. 1985).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of coram nobis. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547 (1961).

Writ of error coram nobis may be granted by judges of supreme court, although trial judge refused to grant writ and although writ is not in aid of appellate jurisdiction of supreme court, since writ is remedial. *Buckler v. State*, 173 Miss. 350, 161 So. 683 (1935).

Refusal of supreme court to grant an appeal from trial court's refusal to grant writ of error coram nobis did not leave petitioner without further remedy, since petitioner could apply to judge of supreme court for such writ. *Buckler v. State*, 173 Miss. 350, 161 So. 683 (1935).

## RESEARCH REFERENCES

**ALR.** Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief. 20 A.L.R.2d 1240.

Jurisdiction to proceed with trial of criminal case pending appeal from order overruling demurrer, motion to quash, or similar motion for dismissal. 89 A.L.R.2d 1236.

Appealability of order arresting judgment in criminal case. 98 A.L.R.2d 737.

Court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error. 64 A.L.R.3d 1226.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction. 96 A.L.R.3d 1174.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 A.L.R.4th 582.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 A.L.R.4th 810.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 A.L.R.4th 194.

Consequences of prosecution's failure to file timely brief in appeal by accused. 27 A.L.R.4th 213.

Right of defendant in state court to bail pending appeal from conviction—modern cases. 28 A.L.R.4th 227.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 A.L.R.4th 229.

Communication between court officials or attendants and jurors in criminal trial

as ground for mistrial or reversal—post-Parker cases. 35 A.L.R.4th 890.

Prosecutor's appeal in criminal case to radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 A.L.R.4th 664.

Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief—State cases. 105 A.L.R.5th 529.

Failure to appeal denial of double jeopardy claim within time limits of Rule 4, Federal Rules of Appellate Procedure, as precluding review of claim on appeal of conviction at retrial. 51 A.L.R. Fed. 770.

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 77 et seq., 222 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2324 et seq.

**Practice References.** Cipes, Bernstein, and Hall, Criminal Defense Techniques (Matthew Bender).

Erickson and George, United States Supreme Court Cases and Comments: Criminal Law and Procedure (Matthew Bender).

Hrones, Criminal Practice Handbook, Third Edition (Michie).

Kadish and others, Criminal Law Advocacy (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Rudstein, Erlinder, and Thomas, Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Manual (Michie).

## § 99-35-103. When state or municipality may appeal.

The state or any municipal corporation may prosecute an appeal from a judgment of the circuit court in a criminal cause in the following cases:

(a) From a judgment sustaining a demurrer to, or a motion to quash an indictment, or an affidavit charging crime; but such appeals shall not bar or preclude another prosecution of the defendant for the same offense.

(b) From a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the Supreme Court shall nevertheless decide the question of law presented.

(c) From a ruling adverse to the state or municipality in every case in which the defendant is convicted and prosecutes an appeal; and the case



shall be treated as if a cross appeal had been formally presented by the state. All questions of law thus presented shall be decided by the Supreme Court.

**SOURCES:** Codes, 1892, § 39; Laws, 1906, § 40; Hemingway's 1917, § 16; Laws, 1930, § 19; Laws, 1942, § 1153; Laws, 1991, ch. 573, § 140, *eff from and after July 1, 1991*.

**Cross References** — Content of record on appeal, see Miss. R. App. P. 10.

## JUDICIAL DECISIONS

1. Cases appealable in general.
- 1.5. Prohibition against appeals.
2. Judgment quashing indictment, etc.
3. Appeal on question of law.
4. Appeal by defendant; cross appeal.
5. Disposition of appeal.

### 1. Cases appealable in general.

Order enjoining grand jury's investigation of district attorney's alleged receipt of improper payments was appealable by state. *State v. Pacific*, 705 So. 2d 1308 (Miss. 1997).

The Supreme Court has subject matter jurisdiction to hear an appeal by the State from a dismissal with prejudice for violation of § 99-17-1's 270-day rule under subsection (a) of this section. *State v. Harrison*, 648 So. 2d 66 (Miss. 1994), overruled on other grounds, *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

The State's cross appeal was proper under subsection (c) of this section where the State alleged that the trial judge exceeded his authority by staying imposition of the jury's sentence of death and imposing in its stead a sentence of life imprisonment without parole. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).

There was no statutory authority for an appeal by the State from a circuit court based upon the circuit judge's failure to sentence a defendant to life without parole following his conviction of burglary and proof that he was an habitual offender under § 99-19-83, and therefore the appeal would be dismissed for lack of jurisdiction. *State v. Lee*, 602 So. 2d 833 (Miss. 1992).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-

51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under subsection (b) of this section; there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause v. Smith*, 548 So. 2d 412 (Miss. 1989).

A State's appeal from an order sustaining a defendant's motion to suppress evidence seized from the trunk of defendant's automobile was interlocutory, thus not authorized by this section, and would be dismissed, where there was no judgment sustaining a demurrer to, or a motion to quash an indictment, or an affidavit charging crime, and where there was no judgment rendered acquitting or convicting defendant. *State v. Parks*, 415 So. 2d 704 (Miss. 1982).

The limitation placed on the state by this section contemplates causes where there is an actual prosecution of a criminal cause to final judgment, and this section did not bar an appeal by the state from an order of the circuit court requiring the presence of the court reporter to transcribe the proceedings of the grand jury. *State v. Burrill*, 312 So. 2d 1 (Miss. 1975).

An appeal by the state was not allowed under this section [Code 1942, § 1153] from the action of a trial court in sustaining defendant's motion, made after the state had rested its case in the prosecution for obtaining money under false pretenses, to exclude the evidence and direct the jury to acquit him on the ground that the proof had failed to show defendant guilty of the crime with which he was charged. *State v. Corroero*, 231 Miss. 155, 94 So. 2d 911 (1957).



State may appeal under this section [Code 1942, § 1153] from adverse rulings on the admission or exclusion of evidence. *State v. Sisk*, 209 Miss. 174, 46 So. 2d 191 (1950); *State v. Jackson*, 217 Miss. 412, 64 So. 2d 341 (1953).

This section [Code 1942, § 1153] does not authorize state or municipality to appeal from judgment discharging defendant on ground that proof was insufficient to sustain conviction. *State v. Sisk*, 209 Miss. 174, 46 So. 2d 191 (1950); *State v. Willingham*, 86 Miss. 203, 38 So. 334 (1905); *Pascagoula v. Cunningham*, 141 Miss. 604, 106 So. 886 (1926).

Under this section [Code 1942, § 1153], state may not appeal from an order of trial court in prosecution for unlawful possession of beer, granting defendant's request for peremptory instructions to jury to return verdict of not guilty. *State v. Sisk*, 209 Miss. 174, 46 So. 2d 191 (1950).

An appeal by the state is not allowable where the court sustains a motion for a directed verdict because of the insufficiency of evidence to support the criminal charge. *State v. Blackburn*, 34 So. 2d 199 (Miss. 1948).

An appeal does not lie on behalf of the state or a municipality under this section [Code 1942, § 1153] from a judgment of acquittal based upon a directed verdict in favor of a defendant in a criminal case where the peremptory instruction in such case is granted because of the insufficiency of the evidence to sustain the charge made in the affidavit or indictment, even though the question involved on the ruling of the trial court may be a mixed one of law and fact. *State v. Ashley*, 194 Miss. 110, 11 So. 2d 832 (1943).

The state may not appeal from an acquittal entered on a directed verdict on the court excluding the testimony at the close of the state's evidence. *State v. Brooks*, 102 Miss. 661, 59 So. 860 (1912).

State is not allowed to appeal in a criminal case except in the specific instances named in Code 1906, § 40 [Code 1942, § 1153], therefore an appeal by the state from a judgment granting bail in a murder case on continuance after indictment is not maintainable. *State v. Key*, 93 Miss. 115, 46 So. 75 (1908).

State is not given an appeal from judgment of acquittal predicated on a peremp-

tory instruction for defendant, but is given one from rulings of the trial court in admitting testimony of a former conviction in the absence of a plea setting it up as a defense, and in admitting parol proof of proceedings in a justice's court. *State v. Ireland*, 89 Miss. 763, 42 So. 797 (1907).

The state cannot appeal from a judgment granting a defendant a new trial and setting aside a verdict convicting him because of objections to the argument of the district attorney. *State v. Thompson*, 86 Miss. 201, 38 So. 321 (1905).

Neither this section [Code 1942, § 1153] nor Code 1906, § 37 [Code 1942, § 1150] authorizes an appeal by a municipality from a judgment of a circuit court discharging one arrested for violating an ordinance of the municipality. *City of Water Valley v. Davis*, 73 Miss. 521, 19 So. 235 (1896).

This section [Code 1942, § 1153] does not authorize an appeal by the state from a judgment granting bail to one accused of a capital offense. *State v. Shrader*, 72 Miss. 541, 18 So. 454 (1895).

Only appeals from final judgments are authorized by this section [Code 1942, § 1153]. Appeal by the state from a judgment setting aside a conviction and awarding a new trial will be dismissed by the supreme court on its own motion. *State v. McDowell*, 72 Miss. 138, 17 So. 213 (1894).

### 1.5. Prohibition against appeals.

Statute revealed a clear prohibition, with only limited exceptions, against the State taking an appeal in criminal cases; the prohibition was a clear legislative pronouncement of the policy of Mississippi regarding the conduct of criminal proceedings. *State v. Hicks*, 806 So. 2d 261 (Miss. 2002).

## 2. Judgment quashing indictment, etc.

Statute permitting state to appeal from quashing of indictment permits appeal where trial court quashes only capital portion of capital murder indictment; quashing of capital portion is final judgment on capital murder charge, in that judicial labor is at an end with regard to that charge. *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997).

The State did not have the authority to appeal from an order granting a judgment notwithstanding the verdict rendered by the trial court to the defendant in a criminal case. *State v. Insley*, 606 So. 2d 600 (Miss. 1992).

Under paragraph (a) of this section [Code 1942, § 1153], the supreme court is authorized to review the judgment of the circuit court sustaining a demurrer to an indictment but not one overruling a demurrer thereto, and, accordingly, ruling of the lower court in overruling a demurrer to the indictment cannot be reviewed. *State v. Wall*, 98 Miss. 521, 54 So. 5 (1910).

### 3. Appeal on question of law.

Where the trial court granted a directed verdict for defendant on the indicted charge of murder (Miss. Code Ann. § 97-3-19(1)(a)) and would not allow the jury to consider whether defendant was guilty of the unindicted crime of manslaughter (Miss. Code Ann. § 97-3-35), the State was allowed to appeal, seeking redress only as to a pure question of law and not for further prosecution of defendant; the State only contended that the trial court's ruling in *Harris* was distinguishable from the facts in this case. The trial court's reliance on *Harris* was misplaced; *Harris* dealt with a lesser offense and had no bearing on a lesser-included offense. *State v. Shaw*, 880 So. 2d 296 (Miss. 2004).

Where the defendant has been acquitted upon the merits of his case by reason of a directed verdict, such acquittal is a bar to any future accusation for the same offense, and an appeal does not subject the defendant to further prosecution. *State v. Thornhill*, 251 Miss. 718, 171 So. 2d 308 (1965).

Notwithstanding an acquittal, the state may appeal from an adverse ruling on a question of law. *State v. Heard*, 246 Miss. 774, 151 So. 2d 417 (1963).

This section [Code 1942, § 1153] does not authorize the state to appeal from a judgment of acquittal where judgment was based upon a mixed question of fact and law. *State v. Wingo*, 221 Miss. 542, 73 So. 2d 107 (1954).

Only a question of law is presented by appeal by state from order sustaining demurrer to indictment. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

Where judgment acquitted defendant of conspiracy to defraud state of gasoline excise taxes, state had right of appeal under paragraph (b) of this section [Code 1942, § 1153]. *State v. Billups*, 179 Miss. 352, 174 So. 50 (1937).

Municipality may prosecute appeal to supreme court from judgment actually acquitting defendant under ordinance, where question of law has been decided adversely. *City of Lumberton v. Frederick*, 165 Miss. 456, 143 So. 488 (1932).

Acquittal of defendant of violation of ordinance on ground ordinance was invalid held adverse determination of question of law, entitling municipality to appeal. *City of Lumberton v. Frederick*, 165 Miss. 456, 143 So. 488 (1932).

Appeal from judgment of acquittal lies only when law question is distinctly unmixed with decision on facts. *Pascagoula v. Delmas*, 157 Miss. 619, 128 So. 743 (1930).

Where acquittal, pursuant to instruction, of charge of violating ordinance permitting animals to run at large resulted because city could not prove cattle had been within city limits before, and therefore decision was mixed with questions of fact, no appeal lies. *Pascagoula v. Delmas*, 157 Miss. 619, 128 So. 743 (1930).

Appeal from judgment of acquittal pursuant to instruction does not present law question for supreme court's decision. *Pascagoula v. Delmas*, 157 Miss. 619, 128 So. 743 (1930).

Instruction in a criminal case directing jury to find defendant not guilty does not present a question of law for the decision of the supreme court on appeal by the state. *State v. Bourdon*, 126 Miss. 877, 89 So. 769 (1921).

Appeal by the state from judgment discharging defendant for insufficiency of evidence presents no question of law for determination by the supreme court. *State v. Adams*, 123 Miss. 514, 86 So. 337 (1920).

Acquittal on the ground that the "evidence did not show the offense charged," did not present a "question of law" from which a municipality could appeal. *City of Jackson v. Harland*, 112 Miss. 41, 72 So. 850 (1916).

Where defendant's appeal from a conviction in the municipal court on a charge



of violating Code 1906, § 1205, and a municipal ordinance, was tried before the circuit judge on an agreed statement of facts, a discharge of defendant by the circuit judge on the ground that the "evidence did not show the offense charged" did not present a question of law. *City of Jackson v. Harland*, 112 Miss. 41, 72 So. 850 (1916).

Whether the court erred in instructing the return of a verdict of acquittal, on a question of law, is subject to review on the state's appeal, there being a judgment actually acquitting accused, and a question of law decided adversely to the state. *State v. Wall*, 98 Miss. 521, 54 So. 5 (1910).

Appeal can be taken only on a question of law, and not on a question of fact. *City of Gulfport v. Stratakos*, 90 Miss. 489, 43 So. 812, 13 Am. Ann. Cas. 855 (1907).

#### 4. Appeal by defendant; cross appeal.

Supreme court should refuse to review adverse ruling of trial judge holding that extradition proceedings were as matter of law insufficient both as to form and substance where respondents failed to reserve an exception or file a cross assignment of error in regard to adverse ruling. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

The purpose of paragraph (c) of this section [Code 1942, § 1153] is to provide an inexpensive, summary, simple method of cross appeal, and the direct appeal compels the supreme court to decide all questions of law ruled adversely to the state where the record discloses the ruling and the exception. *Thomas v. State*, 73 Miss. 46, 19 So. 195 (1895).

Where a sentence as for a felony was set aside and one imposed as for a misdemeanor, and the state excepted, upon appeal by the defendant from the second sentence, the action of the trial court will be reviewed by the supreme court as if a cross appeal had been formally prosecuted by the state. *Thomas v. State*, 73 Miss. 46, 19 So. 195 (1895).

#### 5. Disposition of appeal.

While the circuit court, pursuant to Miss. Code Ann. § 99-35-103(b), could have decided the question of law raised by the prosecution on appeal, it erred by reversing defendant's acquittal on a

charge of driving under the influence (DUI) second offense, granting the prosecution's motion to amend the charge to DUI first offense (which the lower court had denied), and affirming a conviction for DUI first offense which the lower court had not entered. *Jamison v. City of Carthage*, 864 So. 2d 1050 (Miss. Ct. App. 2004).

Where defendant was acquitted of selling cocaine, the trial court erred by not allowing the State to make a Batson objection based on defendant's discriminatory peremptory challenges of Caucasian panel members, and by giving a "two theory" jury instruction in a direct evidence case; however, under Miss. Code Ann. § 99-35-103(b), the judgment of acquittal could not be reversed. *State v. Rogers*, 847 So. 2d 858 (Miss. 2003).

On appeal by state from an order of circuit court sustaining defendant's demurrer to indictment for embezzlement, defendant having been ordered held under same bond pending possible action of another grand jury, supreme court will, in addition to reversing action of lower court in sustaining demurrer, overrule demurrer and remand cause for trial on indictment. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

The supreme court can neither affirm nor reverse a judgment based on the not-guilty verdict of a jury where the sole defense in a criminal prosecution is insanity. *State v. Goering*, 200 Miss. 585, 28 So. 2d 248 (1946).

On appeal by state under paragraph (b) of this section [Code 1942, § 1153], the supreme court could not reverse judgment acquitting a defendant, though trial court improperly excluded certain evidence offered by state. *State v. Johnson*, 166 Miss. 591, 148 So. 389 (1933).

Where accused has been re-indicted for the identical crime, an appeal from a judgment sustaining a demurrer to the original indictment will be dismissed. *State v. Straughter*, 102 Miss. 569, 59 So. 844 (1912).

On appeal by municipality under paragraph (b) of this section [Code 1942, § 1153], opinion will be announced, but case will neither be reversed nor affirmed. *City of Greenwood v. Jones*, 91 Miss. 728, 46 So. 161 (1908).



Where judgment quashing an indictment is reversed, the case will be remanded and a new trial ordered on the

same indictment. *State v. Bacon*, 77 Miss. 366, 27 So. 563 (1899).

## RESEARCH REFERENCES

**ALR.** Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance-modern status. 11 A.L.R.4th 399.

**Am Jur.** 4 Am. Jur. 2d, Appeal and Error §§ 222 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2342, 2343, 2346 et seq.

## § 99-35-105. Prepayment of costs; appeal without prepayment; reimbursement of successful appellants.

Appeals in criminal cases shall not stay the judgment or sentence appealed from unless the appellant shall prepay all of the costs in the lower court, including the cost of preparing the record of the proceedings in the trial court and the fee prescribed in Section 25-7-3, to the clerk of the lower court. If the appellant shall make affidavit that he is unable to prepay the costs, he shall have an appeal without prepayment of costs; and his appeal shall stay the judgment appealed from. It shall be the responsibility of the county in which the conviction was taken to timely prepay all costs when an indigent appellant makes an affidavit that he is unable to make such payments.

It shall be the duty and obligation of the county to reimburse a successful appellant in a criminal case for court costs, including the cost of preparing the record of the proceedings in the trial court.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, art. 2(149); 1857, ch. 64, art. 308; 1871, § 2842; 1880, § 2335; 1892, § 61; Laws, 1906, § 62; Hemingway's 1917, § 38; Laws, 1930, § 41; Laws, 1942, § 1175; Laws, 1978, ch. 335, § 36, eff from and after July 1, 1978.

**Editor's Note** — Laws of 1978, ch. 335, § 40, provides as follows:

"SECTION 40. The provisions of this act shall not apply to any case wherein a petition for appeal has been presented prior to the day this act takes effect, and such appeals shall proceed to final determination with costs collected as though these statutes relating to costs had not been amended, but the provisions hereof shall apply to all other cases then pending and hereafter filed."

**Cross References** — Affidavit to establish poverty in civil suit, see § 11-53-17.

Provision for additional cost to create court education and training fund, see §§ 37-26-1 et seq.

Motions and petitions filed in supreme court for release on appearance bond pending certiorari petition to the United States Supreme Court on the upholding of a criminal conviction by the supreme court, see Miss. R. App. P. 41.

## JUDICIAL DECISIONS

### 1. In general.

A trial court has no authority to deny an appeal to a defendant who files a pauper's affidavit in conformity with this section [Code 1942, § 1175] in lieu of a bond for

costs. *Tarrants v. State*, 219 So. 2d 170 (Miss. 1969).

Appeal bond may be amended after 6 months from taking appeal, to correct bona fide omission of condition to pay cost.

Wallace v. State, 149 Miss. 198, 115 So. 342 (1928).

Appeal lies from conviction of a misdemeanor, where the appellant executes a bail bond, and an affidavit in forma pauperis, without the execution of an appeal bond, or a deposit of sufficient money to pay the costs of the appeal. *Husbands v. State*, 105 Miss. 513, 62 So. 278 (1913).

In order to take appeal defendant must not only file affidavit under this section [Code 1942, § 1175], but she must surrender herself to the proper officer, or execute a bail bond conditioned according to Code 1892, § 64 [Code 1942, § 1178]. *Roberts v. Town of Port Gibson*, 89 Miss. 75, 42 So. 540 (1907).

Where sentence in a capital case is imprisonment for life, on an appeal the defendant, to have a stay of the sentence, must give bond to secure payment of the jail fees to accrue pending the appeal. *Board of Supvrs. v. Worrell*, 67 Miss. 154, 6 So. 629 (1889).

The bond, affidavit, or deposits for costs is required in order to stay the judgment in all criminal cases. Taking bail and discharging the prisoner after conviction on appeal is unauthorized until the section [Code 1942, § 1175] is complied with. *Lum v. State*, 66 Miss. 389, 5 So. 689 (1889).

### RESEARCH REFERENCES

**ALR.** Right of indigent defendant in criminal case to aid state as regards new trial or appeal. 55 A.L.R.2d 1072.

Abatement of state criminal case by accused's death pending appeal of conviction—modern cases. 80 A.L.R.4th 189.

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 421 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 491 et seq. (proceedings relating to security in reviewing court).

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 481-485 (inability to give security).

**CJS.** 4 C.J.S., Appeal and Error §§ 322 et seq.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December, 1979.

## § 99-35-107. Deposit for costs; security for jail fees.

A deposit with the clerk of the court from which an appeal is taken of a sum of money sufficient to cover the costs accrued, and to accrue, the amount of which to be determined by the judge, may be made by the appellant with the posting of his appearance bond, and shall serve to stay execution of sentence until the clerk shall compile the trial court costs and file the cost bill required in criminal cases; and any security for jail fees which the sheriff shall certify to the clerk to be satisfactory to him, shall be sufficient, and the sheriff shall not thereafter be entitled to look to the county for such jail fees.

**SOURCES:** Codes, 1880, § 2336; 1892, § 62; Laws, 1906, § 63; Hemingway's 1917, § 39; Laws, 1930, § 42; Laws, 1942, § 1176; Laws, 1978, ch. 335, § 37, eff from and after July 1, 1978.

**Cross References** — Security for costs in civil action of habeas corpus, see § 11-43-47.

Deposit for costs in civil cases, see § 11-51-29.

Certification in transcript of deposit for costs, and disposition of deposit on termination of case, see § 11-51-69.

Duty of sheriff with respect to bail bond, see §§ 99-5-7, 99-5-15, 99-5-17.

Application of amendment relating to prepayment of lower court costs and supreme court filing fee, see § 99-35-105 Editor's note.

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 421 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 431 et seq. (deposits in lieu of bond).

**CJS.** 4 C.J.S., Appeal and Error §§ 333, 334.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December, 1979.

## § 99-35-109. Bail after conviction of misdemeanor.

In all cases of conviction of a misdemeanor, an appeal taken shall stay the judgment appealed from. The appellant, if sentenced to imprisonment for his offense, or to stand committed until his fine and costs shall be paid, may be relieved from such imprisonment or commitment, pending his appeal, by paying the trial court costs and giving bond, with sufficient resident sureties or one or more guaranty or surety companies authorized to do business in this state, to be approved by the clerk of the court from which the appeal is taken, payable to the state in the penalty of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), to be determined by such clerk, with reference to the grade of the offense, as indicated by the judgment, and the ability of the appellant to give bond, conditioned to surrender himself to the sheriff of the county to suffer the judgment or sentence, if it shall be affirmed by the supreme court, within one (1) week after the judgment of affirmance shall be certified to the circuit court, or to appear before the circuit court at the next term after a judgment of reversal in such case shall be certified to the circuit court, to answer the charge of the state, and so to continue until discharged.

**SOURCES:** Codes, 1880, § 2339; 1892, § 64; Laws, 1906, § 65; Hemingway's 1917, § 41; Laws, 1930, § 44; Laws, 1942, § 1178; Laws, 1978, ch. 335, § 38, eff from and after July 1, 1978.

**Cross References** — Bail generally, see §§ 99-5-1 et seq.

Application of amendment relating to prepayment of lower court costs and supreme court filing fee, see § 99-35-105 Editor's note.

Circuit judge or supreme court judge may fix amount of bond to be given under this section, see § 99-35-111.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Bail pending appeal, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

## JUDICIAL DECISIONS

### 1. In general.

If appellant complied with bail bond which required him to surrender to sheriff within one week after judgment of affirmance by supreme court was certified to

circuit court, and suggestions of error in affirmance were overruled June 5, his sentence of 90 days would not include month of February and was not invalid as exceeding three calendar months, the



maximum sentence provided for conviction of possession of intoxicating liquor. *Langley v. State*, 170 Miss. 520, 155 So. 682 (1934).

In view of this section [Code 1942, § 1178], a peace bond of \$2,500 required of one convicted of possessing liquor held excessive. *McCluney v. State*, 162 Miss. 333, 138 So. 356 (1931).

Appeal lies from conviction of a misdemeanor, where the appellant executes a bail bond and an affidavit in forma pauperis, without the execution of an appeal

bond, or a deposit of sufficient money to pay the costs of the appeal. *Husbands v. State*, 105 Miss. 513, 62 So. 278 (1913).

An appellant may be released on bail pending an appeal under this section [Code 1942, § 1178], but he must also give a bond or make a deposit for costs, or make affidavit of inability to do so. If this is not done the appeal will not be entertained, and he cannot be discharged without complying with both sections [Code 1942, §§ 1175, 1178]. *Lum v. State*, 66 Miss. 389, 5 So. 689 (1889).

### ATTORNEY GENERAL OPINIONS

A trial court judge may not impose a peace bond in excess of one thousand

dollars (\$1,000.00). *Moulder*, August 10, 1998, A.G. Op. #98-0453.

### RESEARCH REFERENCES

**ALR.** Right of defendant in state court to bail pending appeal from conviction—modern cases. 28 A.L.R.4th 227.

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 228, 229.

**CJS.** 4 C.J.S., Appeal and Error §§ 333, 334.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December, 1979.

## § 99-35-111. Bail after conviction of misdemeanor; judge may fix amount of bond.

The circuit judge of the district or presiding on the trial, or a supreme judge, may, in any case, fix the amount of the bond to be given under Section 99-35-109, and the clerk shall act accordingly. Any such bail bond shall be filed by the clerk, and carefully preserved among the papers of the case.

**SOURCES:** Codes, 1880, § 2340; 1892, § 65; Laws, 1906, § 66; Hemingway's 1917, § 42; Laws, 1930, § 45; Laws, 1942, § 1179.

**Cross References** — Constitutional provision for bail, see Miss. Const., Art. 3, § 29. Bail generally, see §§ 99-5-1 et seq.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Bail pending appeal, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

### RESEARCH REFERENCES

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 228, 229.

8 Am. Jur. 2d, Bail and Recognizance §§ 15 et seq.

**CJS.** 4 C.J.S., Appeal and Error §§ 333, 334.

**§ 99-35-113. Failure of appellant on bond to appear in misdemeanor cases.**

If the judgment in a case of misdemeanor be affirmed, and the appellant shall not surrender himself to the proper sheriff, according to the condition of his bail-bond, or shall not appear before the circuit court as the case may require, said court shall proceed as in any other case of forfeited bail-bond. All proper process shall be issued to enforce the judgment of the supreme court in the case by the clerk of the circuit court.

**SOURCES:** Codes, 1880, § 1438; 1892, § 4376; Laws, 1906, § 4942; Hemingway's 1917, § 3218; Laws, 1930, § 3401; Laws, 1942, § 1985.

**Cross References** — Bail generally, see §§ 99-5-1 et seq.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Bail pending appeal, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

**RESEARCH REFERENCES**

**Am Jur.** 8 Am. Jur. 2d, Bail and Recognizance §§ 15 et seq.      **CJS.** 8 C.J.S., Bail §§ 253, 254 et seq.

**§ 99-35-115. Bail after conviction of felony; application for emergency hearing upon denial of bail.**

(1) A person convicted of felony child abuse, sexual battery of a minor or any offense in which a sentence of death or life imprisonment is imposed shall not be entitled to be released from imprisonment pending an appeal to the Supreme Court.

(2)(a) A person convicted of any felony, not enumerated in subsection (1), shall be entitled to be released from imprisonment on bail pending an appeal to the Supreme Court, within the discretion of a judicial officer, if the convict shows by clear and convincing evidence that release of the convict would not constitute a special danger to any other person or to the community, and that a condition or a combination of conditions may be placed on release that will reasonably assure the appearance of the convict as required, and only when the peculiar circumstances of the case render it proper.

(b) If bail is denied, the judicial officer shall place the reasons for such denial of record in the case.

(c) For the purposes of this section, "judicial officer" means the trial court or trial judge, a judge of the district in which the conviction occurred, the Supreme Court or a justice of the Supreme Court in vacation of the court.

(d) The victim or family of a victim shall be entitled to submit a written statement objecting to the granting of release on bail pending appeal.

**SOURCES:** Codes, 1880, § 2341; 1892, § 66; Laws, 1906, § 67; Hemingway's 1917, §§ 43, 44, 45; Laws, 1930, § 46; Laws, 1942, § 1180; Laws, 1916, ch. 217; Laws,

1987, ch. 350; Laws, 1997, ch. 527, § 1; Laws, 2005, ch. 350, § 1, eff from and after passage (approved Mar. 14, 2005.)

**Amendment Notes** — The 2005 amendment inserted “sexual battery of a minor” following “felony child abuse” near the beginning of (1).

**Cross References** — Constitutional provision for bail, see Miss. Const. Art. 3, § 29.

Bail generally, see §§ 99-5-1 et seq.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Post-conviction bail, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

## JUDICIAL DECISIONS

1. Authority to grant bail in general.
2. Persons entitled to bail.
- 2.5. Revocation of bond.
3. Proceedings.

### 1. Authority to grant bail in general.

Inmate was not entitled to bail, pursuant to Miss. Code Ann. § 99-35-115, during the appeal of the denial of the inmate's petition for post-conviction relief, as, under Miss. Code Ann. § 99-39-25(4), bail is not permitted for such prisoners. *Atwell v. State*, 848 So. 2d 190 (Miss. Ct. App. 2003).

Trial judge fixing defendant's bail bond at \$100,000 was not manifestly wrong where defendant had been sentenced to 20 years for aggravated assault and 10 years for shooting into dwelling house, following victim breaking off engagement to defendant, as result of which he shot minimum of 25 bullets into home while she was sleeping; although she survived her left arm and leg were amputated and she suffered loss of use of right elbow and shoulder; additionally, bullets from his rifle also entered bedroom of victim's parents, and at sentencing trial judge stated that defendant was one of the most dangerous criminal defendants he had ever witnessed. *Shook v. State*, 511 So. 2d 1386 (Miss. 1987).

The circuit court had concurrent jurisdiction with the appellate court, for purposes of setting an appearance bond under this section, over a defendant convicted of attempted armed robbery, even though defendant's appeal had already been perfected. *State v. Maples*, 445 So. 2d 540 (Miss. 1984).

The test whether bail should be granted pending petitioner's appeal for conviction

of crime is to be determined by whether the testimony shows that it is probable that confinement has produced or is likely to produce, fatal or serious results and there must be strong grounds for apprehending a fatal result or the permanent, substantial impairment of health. *Ex parte Willette*, 219 Miss. 785, 63 So. 2d 52 (1953).

Chancellor in habeas corpus proceeding cannot grant bail pending appeal to the supreme court, as the circuit and supreme courts, and the judges thereof, only can grant bail under this section [Code 1942, § 1180]. *Leggett v. Vannison*, 133 Miss. 22, 96 So. 518 (1923).

Order admitting one convicted of felony to bail, made by a judge without authority is void, and the supreme court may order the arrest of accused pending appeal. *Marley v. State*, 109 Miss. 169, 68 So. 75 (1915).

The judge of a judicial district to which one convicted of a felony in another judicial district was removed pending appeal, may not admit him to bail. *Marley v. State*, 109 Miss. 169, 68 So. 75 (1915).

### 2. Persons entitled to bail.

Because defendant was properly convicted of murder, rather than manslaughter, since he acted with deliberate design when he shot his wife at her place of employment, he was ineligible for an appeal bond under Miss. Code Ann. § 99-35-115. *Bennett v. State*, — So. 2d —, 2006 Miss. App. LEXIS 675 (Miss. Ct. App. Sept. 19, 2006).

Trial court did not erroneously deny defendant's motion for an appeal bond pursuant to Miss. Code Ann. § 99-35-115(2)(a) because the trial court consid-



ered him a danger to the community due to his criminal history. Further, the denial of post-conviction bail to defendant was well within the trial court's discretion. *Busick v. State*, 906 So. 2d 846 (Miss. Ct. App. 2005).

Although a defendant was indigent, had family ties in the county, and had made all court appearances prior to conviction while under \$1,000 bail, the trial court in dismissing the defendant's petition for a writ of habeas corpus was not manifestly wrong in refusing to reduce the defendant's bail below \$3,000 or to release the defendant on his own recognizance, where the defendant had been convicted of two charges of aggravated assault, crimes of violence, and sentenced to concurrent terms of seven years. *Bumphis v. State*, 405 So. 2d 116 (Miss. 1981).

Where evidence showed that continued confinement would produce or was likely to produce, fatal or serious results to 74-year-old prisoner who was suffering from bronchial asthma and cardiac asthma, the court was authorized to use its discretion to release a prisoner pending appeal from conviction. *Ex parte Willette*, 219 Miss. 785, 63 So. 2d 52 (1953).

If any person convicted of felony other than treason, murder, rape, arson, burglary and robbery, is ready to give bail pending appeal, he is entitled to it, and it is error to commit him to jail; duty of the trial judge to grant bail and fix amount thereof then and there. *Crosby v. State*, 125 Miss. 433, 88 So. 3 (1921).

Where only defense of relator, accused of murder, was temporary insanity and the first trial resulting in a conviction was set aside, and the second resulted in a mistrial, relator is not entitled to admission to bail. *State v. Gordon*, 105 Miss. 454, 62 So. 431 (1913).

Where defendant killed a city marshal, attempting in the lawful execution of his duties as a peace officer of the city to arrest him, he is not entitled to bail. *Ex parte Carter*, 103 Miss. 302, 60 So. 324 (1913).

Where evidence does not show that the short confinement in jail before determination of appeal would seriously impair his health or imperil his life, bail will be denied. *Ex parte Atkinson*, 101 Miss. 744, 58 So. 215 (1912).

A person convicted of embezzlement is entitled to bail pending appeal, upon certificates of six physicians showing that confinement will aggravate an illness of accused, though contradicted by certificates of two other physicians. *Ex parte Atkinson*, 101 Miss. 744, 58 So. 215 (1912).

Refusal of bail pending appeal from conviction for grand larceny of a defendant 49 years of age, because of alleged ill health consisting of heart disease, asthma, catarrh, and indigestion, was not an abuse of discretion. *Winegarden v. State*, 87 Miss. 264, 39 So. 1013 (1906).

It is improper to admit to bail pending an appeal one convicted of felony because he has a crop which needs his attention and the forced neglect of which will result in his financial ruin, and because his wife is frail and delicate. Bail is a special favor to be granted, not on personal grounds, but under peculiar circumstances to be judged of as a matter of sound judicial discretion. *Hill v. State*, 64 Miss. 431, 1 So. 494 (1887).

### 2.5. Revocation of bond.

There is nothing explicit in this section that would indicate that revocation of an appeal bond is appropriate because of the appellant's subsequent criminal behavior. *Lee v. State*, 759 So. 2d 1264 (Miss. Ct. App. 2000).

### 3. Proceedings.

Trial court erred in granting defendant bail pending appeal as the trial court failed to consider the three factors in Miss. Code Ann. § 99-35-115(2)(a) before making its decision. *Jones v. State*, 905 So. 2d 644 (Miss. Ct. App. 2004).

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), this section, [former] Miss. Sup. Ct. R. 9 or [former] Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since

that Act, in the pure post-conviction collateral relief sense, is arguably “post-conviction habeas corpus renamed,” matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738 (Miss. 1990).

Unsworn certificates of physicians are inadmissible, under a petition for release on bail, pending an appeal, by one convicted of embezzlement. *Ex parte Atkinson*, 101 Miss. 744, 58 So. 215 (1912).

Supreme court will not consider the merits of a petition to grant bail, pending an appeal of a criminal prosecution. *Ex parte Atkinson*, 101 Miss. 744, 58 So. 215 (1912).

Power of the supreme court to act on petition for bail pending an appeal in a criminal cause is not to be exercised until after its presentation in a nisi prius court. *Ex parte Atkinson*, 101 Miss. 744, 58 So. 215 (1912).

### ATTORNEY GENERAL OPINIONS

The provisions of this section would control when a defendant seeks post-con-

viction bail. *Simmons*, May 23, 1996, A.G. Op. #96-0238.

### RESEARCH REFERENCES

**ALR.** Right of defendant in state court to bail pending appeal from conviction—modern cases. 28 A.L.R.4th 227.

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 228, 229.

8 Am. Jur. 2d, Bail and Recognizance §§ 15 et seq.

**CJS.** 4 C.J.S., Appeal and Error §§ 333, 334.

**Law Reviews.** Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 1:2.

## § 99-35-117. Bail after conviction of felony; judge to fix amount of bond; judge or sheriff may approve bond.

Where an order shall be made as provided in Section 99-35-115, the court or judge shall designate the amount of the bond to be given; and the clerk of the court where the conviction was had shall take bond of the appellant with resident sureties or one or more guaranty or surety companies authorized to do business in this state, to be approved by him, in the sum fixed by the order, payable to the state, and conditioned for the appearance of the party in the supreme court and circuit court to abide by and perform such sentence or judgment as may be rendered in the case; or the supreme court or circuit court, or any judge of either court making such order for bail, may take and approve the bond required to be given, or it may be taken by the sheriff in whose custody such prisoner may be, and shall be sent to the supreme court. All the provisions of this chapter on the subject of bail, as far as applicable, shall be applicable to bail for the appearance of any person before the supreme court.

**SOURCES:** Codes, 1880, § 2342; 1892, § 67; Laws, 1906, § 68; Hemingway’s 1917, § 46; Laws, 1930, § 47; Laws, 1942, § 1181.

**Cross References** — Constitutional provision for bail, see Miss. Const., Art. 3, § 29. Bail generally, see §§ 99-5-1 et seq.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Bail pending appeal, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

## RESEARCH REFERENCES

**Am Jur.** 4 Am. Jur. 2d, Appellate Review §§ 228, 229.

8 Am. Jur. 2d, Bail and Recognizance §§ 15 et seq.

### § 99-35-119. Failure of appellant on bond to appear in felony cases.

If the appellant in a case of felony do not appear, according to the conditions of his bail-bond, before the supreme court to receive judgment, the court shall proceed as a circuit court is required to do in case of a failure of a party bound to appear in like cases, and may issue the proper process, and may render judgment, and enforce it by execution, and may issue process to any county for the arrest of the appellant, and have him brought before the court to receive judgment.

**SOURCES:** Codes, 1880, § 1437; 1892, § 4375; Laws, 1906, § 4941; Hemingway's 1917, § 3217; Laws, 1930, § 3400; Laws, 1942, § 1984.

**Cross References** — Constitutional provision for bail, see Miss. Const., Art. 3, § 29. Bail generally, see §§ 99-5-1 et seq.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

When a circuit court would and would not set aside judgments on forfeited recognizances or bonds, see Miss. Unif. Cir. & County Ct. Prac. R. 1.08.

Bail pending appeal, see Miss. Unif. Cir. & County Ct. Prac. R. 12.01.

## JUDICIAL DECISIONS

### I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

### II. UNDER FORMER § 99-35-123.

11. In general.

was affirmed on certificate of appeal, where the defendant, who had escaped from jail during pendency of the appeal, failed to file a transcript, and the return day had long since passed. *Nealy v. State*, 493 So. 2d 1294 (Miss. 1986).

### I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

### II. UNDER FORMER § 99-35-123.

11. In general.

Armed robbery conviction and sentence



## RESEARCH REFERENCES

**Am Jur.** 8 Am. Jur. 2d, Bail and Recognizance §§ 15 et seq.      **CJS.** 8 C.J.S., Bail §§ 253, 254 et seq.

### §§ 99-35-121 through 99-35-125. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 99-35-121. [Codes, 1892, § 69; 1906, § 70; Hemingway's 1917, § 50; 1930, § 48; 1942, § 1182; Laws, 1920, ch. 147; 1978, ch. 335, § 39]

§ 99-35-123. [Codes, 1892, § 70; 1906, § 71; Hemingway's 1917, § 51; 1930, § 50; 1942, § 1184]

§ 99-35-125. [Codes, 1892, § 71; 1906, § 72; Hemingway's 1917, § 52; 1930, § 51; 1942, § 1185]

**Editor's Note** — Former § 99-35-121 was entitled: Duty of circuit clerk to certify appeals; form of certificate.

Former § 99-35-123 was entitled: Certificate of appeal treated as record of cause in absence of transcript.

Former § 99-35-125 was entitled: Return-day in criminal cases.

### § 99-35-127. Sheriff of Hinds County to receive prisoners; fees.

The sheriff of Hinds County shall receive and safely keep, according to the order of the supreme court, all persons ordered into his custody. The sheriff shall be paid his fees therefor out of the treasury of the proper county, or out of the state appropriation for the judicial department, when certified by the supreme court.

**SOURCES:** Codes, 1880, § 1439; 1892, § 4377; Laws, 1906, § 4943; Hemingway's 1917, § 3219; Laws, 1930, § 3402; Laws, 1942, § 1986.

**Cross References** — Person appealing conviction to supreme court being delivered to sheriff of county where supreme court is held, see § 99-19-41.

### § 99-35-129. Execution of sentence; counsel may prosecute appeal.

The sentence of the supreme court in all criminal cases brought before it shall be executed in like manner as if passed by the court in which the prosecution originated. It shall not be necessary to bring any person charged with a criminal offense before the supreme court; but his appeal may be prosecuted by counsel.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, class 4, art. 1(9); 1857, ch. 63, art. 15; 1871, § 417; 1880, § 1430; 1892, § 4367; Laws, 1906, § 4933; Hemingway's 1917, § 3209; Laws, 1930, § 3393; Laws, 1942, § 1977.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Procedure following issuance of mandate by supreme court in criminal cases, see Miss. R. App. P. 41.

## § 99-35-131. Appellant granted credit for time served in prison pending appeal.

In case of an affirmance by the supreme court of a judgment for imprisonment, if the appellant had remained in prison pending the appeal, the time of imprisonment shall be credited to him, but if he have been on bail, the supreme court shall fix the time for the commencement of his imprisonment, under the judgment of affirmance, so as to cause him to suffer the full time of imprisonment fixed by the judgment of the court below.

**SOURCES:** Codes, 1880, § 1431; 1892, § 4368; Laws, 1906, § 4934; Hemingway's 1917, § 3210; Laws, 1930, § 3394; Laws, 1942, § 1978.

**Cross References** — Credit for time of prisoner's pre-trial or pre-appeal confinement, see § 99-19-23.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Denial of credit for time served in jail and of "good time" to person convicted of felony who appeals judgment of conviction and who remains in jail pending disposition of appeal due to inability to make bond, while allowing credit for time served in jail and award of "good time" to convicted felons serving sentence in county jail without appealing conviction is denial of equal protection, contrary to Fourteenth Amendment. *Lacy v. State*, 468 So. 2d 63 (Miss. 1985).

In fixing of time for the commencement of imprisonment of defendant who was convicted of robbery with firearms, defendant is to be credited on his sentence with

such time as he may have been confined in prison pending his appeal to the state supreme court and prior to the perfection of his appeal to the Supreme Court of the United States. *Brooks v. State*, 213 Miss. 1, 56 So. 2d 9 (1952).

Commencement of imprisonment of defendant, confined in jail during pendency of suggestion of error, held date of affirmance of judgment. *Davenport v. State*, 143 Miss. 765, 109 So. 789 (1926).

Failure of respondent to prosecute her appeal and order dismissing it did not deprive her of right to credit for time spent in jail pending appeal. *Fairley v. State*, 114 Miss. 510, 75 So. 374 (1917).

## RESEARCH REFERENCES

**ALR.** Right to credit for time served under erroneous or void sentence or in-

valid judgment of conviction necessitating new trial. 35 A.L.R.2d 1283.

## § 99-35-133. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 1432; 1892, § 4369; 1906, § 4935; Hemingway's 1917, § 3211; 1930, § 3395; 1942, § 1979]

**Editor's Note** — Former § 99-35-133 was entitled: Appearance of appellant in felony case to receive judgment.

### **§ 99-35-135. Remand and custody of prisoner on affirmance of sentence.**

If the judgment be affirmed, on appeal, and the offense be punishable with death, the supreme court shall name the day of execution, and remand the prisoner to the proper county, if necessary; and the sheriff of the county where the prisoner shall have been convicted shall execute the sentence. If the sentence be for confinement in the penitentiary, and the defendant be not present, but in custody, the clerk of the supreme court shall forthwith notify the legal authorities of the penitentiary as in cases of conviction for penitentiary offenses in the circuit court, who shall send for the convict as provided in such cases.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, art. 15; 1857, ch. 64, art. 313; 1871, § 2814; 1880, § 1434; 1892, § 4371; Laws, 1906, § 4937; Hemingway's 1917, § 3213; Laws, 1930, § 3396; Laws, 1942, § 1980.

**Cross References** — Notification of commitment of prisoners, see §§ 99-19-43 et seq.

Execution in capital cases, see §§ 99-19-51 et seq.

Review by Mississippi Supreme Court of imposition of death penalty, see § 99-19-105.

Date of execution of death sentence, see § 99-19-106.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

### **§ 99-35-137. Copy of death sentence to be delivered to sheriff.**

It shall be the duty of the clerk of the court to which the mandate of the supreme court for the execution of a prisoner punishable by death is sent, forthwith to deliver to the sheriff of the proper county a copy of the sentence, under the seal of his office, which shall be the warrant of the sheriff for executing the convict.

**SOURCES:** Codes, 1880, § 1435; 1892, § 4372; Laws, 1906, § 4938; Hemingway's 1917, § 3214; Laws, 1930, § 3397; Laws, 1942, § 1981.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

### **§ 99-35-139. Prisoner to be delivered to sheriff of proper county if new trial ordered.**

If any person found guilty of a felony shall be in the penitentiary, and the



judgment sentencing him shall be reversed and a new trial ordered, he shall be sent to the jail of the county in which he was tried by the legal authorities of the penitentiary, and delivered to the sheriff of the county.

**SOURCES:** Codes, 1880, § 1436; 1892, § 4373; Laws, 1906, § 4939; Hemingway's 1917, § 3215; Laws, 1930, § 3398; Laws, 1942, § 1982.

**Cross References** — Disposition of criminal defendant pending appeal, see §§ 99-19-39 through 99-19-42.

### § 99-35-141. Clerk to notify penitentiary of reversals.

The clerk of the supreme court shall, within five days after the reversal of a judgment sentencing any prisoner to the penitentiary, notify the legal authorities of the penitentiary of the reversal, unless it appear of record that the person so sentenced is not in his keeping.

**SOURCES:** Codes, 1892, § 4374; Laws, 1906, § 4940; Hemingway's 1917, § 3216; Laws, 1930, § 3399; Laws, 1942, § 1983.

### § 99-35-143. Errors which are not grounds for reversal.

A judgment in a criminal case shall not be reversed because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, or because of any error or omission in the case in the court below, except where the errors or omissions are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court. And no judgment in any case originating in a justice court, or in a municipal court, and appealed to the circuit court, shall be reversed because it may appear in the supreme court transcript that the judgment or record of the said justice or municipal court was not properly certified or was not certified at all, or was missing in whole or in part, unless the record further shows that objection on that account was made in the circuit court, in the absence of which objection in the circuit court there shall be a conclusive presumption that the defects in this clause mentioned did not exist in the circuit court proceedings. Provided however, that the foregoing clause shall not apply to cases wherein a record in the supreme court of the transcript from the justice or municipal court is necessary to a fair understanding of the proceedings in the circuit court.

**SOURCES:** Codes, 1880, § 1433; 1892, § 4370; Laws, 1906, § 4936; Hemingway's 1917, § 3212; Laws, 1930, § 3403; Laws, 1942, § 1987.

**Cross References** — Judgment not to be reversed for certain errors, see § 11-3-35. Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

## JUDICIAL DECISIONS

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**1. Validity.**

This section [Code 1942, § 1987] is constitutional in its application to arraignment and plea-mere steps in the procedure and in matters not jurisdictional, but cannot cure its jurisdictional errors. *Arbuckle v. State*, 80 Miss. 15, 31 So. 437 (1901).

The statute impinges on no principle of justice and in no degree violates any right of the accused. *Fleming v. State*, 60 Miss. 434 (1882); *Arbuckle v. State*, 80 Miss. 15, 31 So. 437 (1901).

There are no valid constitutional objections to the statute as applied to criminal cases. *Ex parte Phillips*, 57 Miss. 357 (1879).

**2. Objections and exceptions, necessity.**

Trial court's instruction to jurors, prior to deliberations, that they could pack their belongings the next morning in anticipation of going home in the event verdict was reached did not warrant mistrial in murder prosecution, where defendant failed to contemporaneously object to such instruction and request corrective action. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant's failure to make contemporaneous objection left unpreserved her

claim that trial court violated her rights to due process by moving venireman to end of list of potential jurors. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

An assignment of error based on the prosecutor's comment on the defendant's failure to testify was not procedurally barred for failure to make a contemporaneous objection because the right not to take the witness stand is a fundamental constitutional right. *Livingston v. State*, 525 So. 2d 1300 (Miss. 1988).

The rule that any error is waived if no contemporaneous objection is made is equally applicable in a capital case. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

The rule that the Mississippi Supreme Court will not consider an error raised for the first time on appeal, except in exceptional cases, is founded in part on the fair assumption that an accused, in the face of incarceration, will make and preserve all objections available to him, and the rule is further supported by the Supreme Court's hesitancy to place a trial judge in error on a matter not presented to him for decision. *Copeland v. State*, 423 So. 2d 1333 (Miss. 1982).

The statute does not require a prisoner to except to actions or rulings which are in his favor. *Whitten v. State*, 61 Miss. 717 (1884).

A case will not be reversed for errors assigned, to which no exceptions were taken in the trial court. *Fleming v. State*, 60 Miss. 434 (1882); *Hardeman v. State*, 16 So. 876 (Miss. 1894).

**3. —Time for taking exceptions.**

Exceptions not jurisdictional in their nature must be seasonably made in the



trial court to prevent the application of this section [Code 1942, § 1987]. Such objection is not seasonably made when presented for the first time in a motion in arrest of judgment. *Short v. State*, 82 Miss. 473, 34 So. 353 (1903).

#### 4. Application to criminal cases, generally.

A trial court abused its discretion when it sustained the State's objection to the defense counsel's use during closing argument of a homemade chart as a visual aid to demonstrate to the jury the various standards of proof and belief which fell short of the "beyond a reasonable doubt" standard; while distinctions between reasonable doubt, all possible doubt, beyond a shadow of a doubt, and the like, are not properly the subject of jury instructions, they are permissible during a trial counsel's closing argument. However, the trial court's error was harmless beyond a reasonable doubt since there was nothing depicted on the chart that could not have been generously explored and explained via the spoken word. *Heidelberg v. State*, 584 So. 2d 393 (Miss. 1991).

A trial judge's remark at the beginning of trial that defense counsel was appointed, though not particularly commendable, did not amount to reversible error. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), *rev'd* on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Although an officer was allowed to testify at a suppression hearing even though he had remained in the courtroom during the prior testimony of 3 other officers after the defendant had invoked his rights under Rule 615 Miss.R.Ev., regarding the exclusion of witnesses, the technical violation of Rule 615 was harmless error where nothing in the officer's testimony could reasonably have adversely affected the defendant on any issue pending at the suppression hearing. *Stokes v. State*, 548 So. 2d 118 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759 (1990), dismissal of habeas corpus *aff'd*, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

In a prosecution for sale of cocaine, an informant who was not called by the prosecution but was called by the defense, qualified as an adverse witness and therefore qualified under Rule 611, Miss.R.Ev. The defense would have been allowed wide ranging cross-examination had the prosecution called the witness; it is unfair that the prosecution could defeat any attempt by the defense to present its theory that the defendant was "set up" by the simple expedient of not calling the informant as a witness. Although the court erred in not allowing the defense to call the informant as an adverse witness, the error did not merit reversal where the informant only introduced the defendant and the undercover agent who sold cocaine to the defendant, the informant did not participate in the sale, the informant was not the primary witness and the prosecution did not need the informant's testimony to present a *prima facie* case against the defendant. *Hall v. State*, 546 So. 2d 673 (Miss. 1989).

A defendant who was led into the courtroom wearing leg irons was not entitled to a mistrial where the shackles were removed as soon as the defendant was seated and there was no evidence that any of the jurors had actually seen the shackles. *Fisher v. State*, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus *rev'd*, 997 F.2d 1095 (5th Cir. 1993).

Although the denial of the defendant's right to counsel at a line up was a technical violation of his constitutional right to counsel, it was "harmless constitutional error" where the witnesses' identification of the defendant was based on the their view of the defendant at the time of the crime rather than on the line up identification and there was other overwhelming evidence favoring conviction. *Jimpson v. State*, 532 So. 2d 985 (Miss. 1988).

Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94 (1950).

Constitutional rights of defendant in prosecution for assault and battery with intent to kill were violated warranting reversal of conviction where proof of state failed to show any authority for seizure of



defendant's automobile, the search of his premises and seizure of his coat and pistol, the examination of the person of defendant for a bullet wound and a photograph thereof, the sheriff's comparison of a tire on the automobile with the dim track which he had observed at the scene, and on cross-examination of defendant the state was permitted to ask questions showing guilt of another crime, notwithstanding that record failed to show any objections thereto or that a motion for new trial was made. *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94 (1950).

Rule that conviction will be affirmed unless it appears that another jury could reasonably reach different verdict upon proper trial than that returned on former one will not be applied to conviction of burglary when prosecuting evidence was not confined to burglary in question but issue was made as to whether defendant had stolen radio on former occasion or had been sassy and impudent to officers in denying his guilt, or in trying to change alleged confession, it being highly prejudicial to colored defendant to show he was impudent to officers. *Scarborough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).

One accused of crime is entitled to another trial when his constitutional right to fair and impartial trial has been violated, regardless of fact that evidence on first trial may have shown him to be guilty beyond every reasonable doubt, and until he has had a fair and impartial trial within the meaning of constitution he is not to be deprived of his liberty by sentence to state penitentiary. *Scarborough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).

In view of this section [Code 1942, § 1987], presumption of innocence disappeared when jury found defendant guilty, and was superseded by presumption that verdict of jury was right and that defendant was guilty. *Dean v. State*, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

The observance of every rule for the protection of the accused is as essential now as before the statute was passed. Its effect is simply a presumption that the judgment of the lower court is correct, and that all things were rightly done. *Ex parte Phillips*, 57 Miss. 357 (1879); *Spivey v.*

*State*, 58 Miss. 743 (1881); *Fleming v. State*, 60 Miss. 434 (1882).

Objections that record failed to show a proper organization of the trial court in a criminal case, or where it was held, or what judge presided, or whether any judge was present, are unavailing in view of this section [Code 1942, § 1987]. *Fleming v. State*, 60 Miss. 434 (1882).

#### 5. —Indictment and affidavit.

Where the defendant did not expressly set forth specific grounds in his motion for a directed verdict at the conclusion of the state's case, and the trial court did not have an opportunity to pass upon the contention that the defendant was not charged with a crime in the indictment since his full name was not set out therein, this contention was not available to him on appeal. *Anselmo v. State*, 312 So. 2d 712 (Miss. 1975).

Defendant waived his right to assert as error the failure of the minutes of the circuit court to reflect an amendment to the indictment changing the date of the offense, where he asserted such error for the first time on appeal. *Looney v. State*, 304 So. 2d 44 (Miss. 1974).

No reversible error was committed by trial court in permitting the indictment to be amended by changing the first name of the alleged purchaser of marijuana without an order authorizing it actually being entered on the minutes of the court, where defendant failed to note any objection or complaint about the amendment during the trial and the record affirmatively showed the absence of any objection to the amendment as made. *Hammond v. Dubard*, 279 So. 2d 594 (Miss. 1973).

Where the defendant did not object in the trial court to a variance between the indictment and the proof as to the ownership of the store allegedly defrauded by the defendant, he could not complain of the variance on appeal. *Ellis v. State*, 254 So. 2d 902 (Miss. 1971).

In prosecution for grand larceny where the defendant pleaded not guilty, and where the indictment alleged stolen property to be personality of Hattiesburg Hardware Stores, instead of that of a Mississippi corporation of like name, the indictment was not fatal where the accused made no request for directed verdict

and made no suggestion of variance between the indictment and the proof, and did not file a demurrer to the indictment. *Wiggins v. State*, 215 Miss. 441, 61 So. 2d 145 (1952).

Objection that evidence failed to show whether crime was committed before indictment was returned could not be raised for first time on appeal. *Wooten v. State*, 155 Miss. 726, 125 So. 103 (1929).

Objections to affidavit in criminal case cannot be made for the first time on appeal. *Evans v. State*, 92 Miss. 34, 45 So. 706 (1908).

Objection that indictment was amended without entry on the minutes of the order allowing it could not be heard for the first time on appeal. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

Where the record shows demurrer to indictment but not the ground of demurrer, this section [Code 1942, § 1987] applies so far as the demurrer is concerned. *Coleman v. State*, 40 So. 230 (Miss. 1906).

Fact that record in criminal case contained no copy of the indictment did not warrant reversal where the record showed no objection to its absence in the trial court. *Spivey v. State*, 58 Miss. 743 (1881).

#### **6. —Arraignment and plea.**

Where arraignment of accused was not had until after the close of state's case, objection cannot avail defendant to set aside conviction, where he waived proper arraignment by proceeding to trial without objection. *Scruggs v. State*, 130 Miss. 49, 93 So. 482 (1922).

Arraignment and plea in criminal case are not jurisdictional so that failure of the record to show such arraignment and a plea of not guilty, not specifically excepted to in the trial court, was cured under this section [Code 1942, § 1987]. *Arbuckle v. State*, 80 Miss. 15, 31 So. 437 (1901).

#### **7. —Matters relating to jury.**

In a burglary prosecution, although a prospective juror who expressed uncertainty as to her ability to be a fair juror because of her sympathy for the elderly victim should have been excused for cause, the error was harmless beyond a reasonable doubt where the defendant suffered no actual prejudice. *Carr v. State*, 555 So. 2d 59 (Miss. 1989).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

The exclusion of jurors who would not consider the death penalty under any circumstances was not error. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

Error of court in refusing to excuse jurors for cause in criminal case will not be considered on appeal where it appears from record that appellant used only five peremptory challenges and hence his peremptory challenges were not exhausted. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).



Defendants could not complain for first time on appeal that grand jury and petit jury were not sworn. *Brown v. State*, 173 Miss. 542, 158 So. 339 (1935), error overruled, 173 Miss. 542, 161 So. 465 (1935), rev'd on other grounds, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), conformed to, 167 So. 82 (Miss. 1936).

Murder conviction would not be reversed on the ground that grand jury and petit jury were not sworn, where fact did not affirmatively appear. *Brown v. State*, 173 Miss. 542, 158 So. 339 (1935), error overruled, 173 Miss. 542, 161 So. 465 (1935), rev'd on other grounds, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), conformed to, 167 So. 82 (Miss. 1936).

Judgment will not be reversed because juror was not qualified elector. *Bowman v. State*, 141 Miss. 115, 106 So. 264 (1925).

Failure to specially swear the jury in a capital case held a non-jurisdictional defect to be taken advantage of before verdict, and not to be first made in motion for new trial. *Hill v. State*, 112 Miss. 375, 73 So. 66 (1916).

If a juror, in his voir dire, discloses facts disqualifying himself, a defendant declining to object to him for cause cannot, after verdict, complain of his disqualification, nor make the point in the supreme court. *West v. State*, 80 Miss. 710, 32 So. 298 (1902).

The objection that the jury was not sworn cannot be first raised in the supreme court in a criminal case. *Alexander v. State*, 22 So. 871 (Miss. 1898).

#### 8. — Presence of accused.

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Where the record does not affirmatively show that the defendant was in court at the time the jury's verdict was returned or when the judgment and sentence was pronounced against him, the defendant was

not entitled to a reversal where he made no ground of special exception in the trial court in this respect. *Jones v. State*, 227 Miss. 518, 86 So. 2d 348 (1956).

Conviction not reversed because record does not show accused was present when jury was impaneled. *Schwartz v. State*, 103 Miss. 711, 60 So. 732 (1913).

#### 9. — Pronouncement of sentence.

The defendant was not entitled to reversal of his conviction on the basis that his sentence was not announced in open court where he failed to point out this perceived procedural defect at the trial level. *Beckum v. State*, — So. 2d —, 2000 Miss. App. LEXIS 568 (Miss. Ct. App. Dec. 5, 2000).

The language in § 99-37-3(3) infers that a defendant must object to the imposition of restitution at the time of sentencing. Thus, the imposition of restitution was not reversed even though the judge erred in using facts not in evidence to determine the amount of restitution where the defendant failed to object to the restitution at the time of sentencing. *Powell v. State*, 536 So. 2d 13 (Miss. 1988).

Where the record does not affirmatively show that the defendant was in court at the time the jury's verdict was returned or when the judgment and sentence was pronounced against him, the defendant was not entitled to a reversal where he made no ground of special exception in the trial court in this respect. *Jones v. State*, 227 Miss. 518, 86 So. 2d 348 (1956).

Failure of judgment of conviction for rape to recite that the defendant was placed at the bar for sentence does not constitute reversible error on appeal, since such failure was not complained of in the trial court. *Buchanan v. State*, 225 Miss. 399, 83 So. 2d 627 (1955).

Judgment of conviction in a murder prosecution was not void where the alleged error of failing to have the judgment recite that the defendant was placed at the bar, and asked the question whether he had anything to say as to why judgment and sentence of the court should not be pronounced against him, was not made grounds of special exception in the court below, and was not set up as ground for a new trial. *Holloway v. State*, 187 Miss. 238, 192 So. 450 (1939).



**10. —Venue.**

On an appeal from a conviction in a justice of peace court for the unlawful possession of intoxicating liquor, or other misdemeanors, the state must prove in what district of the county the offense occurred; and the question of whether or not venue was proved may be raised for the first time in the supreme court. *Jones v. State*, 230 Miss. 887, 94 So. 2d 234 (1957), overruled on other grounds, *Mattox v. State*, 243 Miss. 402, 137 So. 2d 920 (1962).

A conviction for petit larceny could not be sustained on appeal under this section [Code 1942, § 1987] where the record was silent when the case was submitted to the jury as to whether the alleged offense was committed within the district of the justice of the peace court from which the case was appealed. *Johnson v. State*, 186 Miss. 544, 191 So. 115 (1939).

Venue is jurisdictional and may be assigned as error on appeal without exception. *Quillen v. State*, 10 Miss. (2 S. & M.) 2735A, 64 So. 736 (1914); *Horton v. State*, 123 Miss. 525, 86 So. 338 (1920).

Venue in criminal case is jurisdictional and failure to prove crime committed in district of justice trying case may be reviewed although question not raised below. *Monroe v. State*, 103 Miss. 759, 60 So. 773 (1913).

Failure of state to prove venue in criminal case is jurisdictional and may be reviewed although not raised in lower court. *Allen v. State*, 98 Miss. 192, 53 So. 498 (1910); *Cawthon v. State*, 100 Miss. 834, 57 So. 224 (1911); *Kyle v. Calhoun City*, 123 Miss. 542, 86 So. 340 (1920); *Griffin v. State*, 140 Miss. 175, 105 So. 457 (1925); *Brasham v. State*, 140 Miss. 712, 106 So. 280 (1925); *Dorsey v. State*, 141 Miss. 600, 106 So. 827 (1926); *Evans v. State*, 144 Miss. 1, 108 So. 725 (1926), appeal after remand, 110 So. 249 (Miss. 1926); *Norris v. State*, 143 Miss. 365, 108 So. 809 (1926); *Kitchens v. State*, 186 Miss. 443, 191 So. 116 (1939); *Johnson v. State*, 186 Miss. 544, 191 So. 115 (1939).

**11. —Jurisdiction of trial court.**

Upon an appeal from a conviction of unlawful possession of intoxicating liquor, the contention, made for the first time in the supreme court, that the circuit court

had no jurisdiction on an appeal from a justice of the peace court, because there was no certified copy of the proceedings had in the justice of the peace court could not avail defendant whose only objection made to the transcript at the time of the trial was that it was not under seal by the justice of the peace. *Jones v. State*, 230 Miss. 887, 94 So. 2d 234 (1957), overruled on other grounds, *Mattox v. State*, 243 Miss. 402, 137 So. 2d 920 (1962).

The mere fact that the transcript of a record on appeal from the police court to the circuit court recited that it was certified by two named city officials whereas in fact it was certified by two other city officials did not divest the circuit court of jurisdiction over the offense of keeping open a grocery store on the Sabbath day. *Walton v. City of Tupelo*, 229 Miss. 193, 90 So. 2d 193 (1956).

Jurisdiction of trial court may be questioned for first time on appeal. *Rodgers v. Hattiesburg*, 99 Miss. 639, 55 So. 481 (1911); *Brasham v. State*, 140 Miss. 712, 106 So. 280 (1925).

**12. —Matters of pleading.**

In prosecution for grand larceny where the defendant pleaded not guilty, and where the indictment alleged stolen property to be personalty of Hattiesburg Hardware Stores, instead of that of a Mississippi corporation of like name, the indictment was not fatal where the accused made no request for directed verdict and made no suggestion of variance between the indictment and proof, and did not file a demurrer to the indictment. *Wiggins v. State*, 215 Miss. 441, 61 So. 2d 145 (1952).

Claim of variance not made ground for special exception below cannot be made on appeal. *Thomas v. State*, 103 Miss. 800, 60 So. 781 (1913).

**13. Evidence; generally.**

Although neither the fact of the taking of a polygraph examination nor the results of such an examination are admissible into evidence, the mistaken inclusion of a polygraph consent form in the materials that went to the jury room during the jury deliberation did not constitute reversible error where no one could state when the consent form was placed in the

evidence envelope, its presence in the evidence envelope did not show that it was viewed by the jury, testimony from 3 jurors did not evidence any certainty of what exhibits when to the jury room, although there was testimony evidencing the juror's knowledge of the defendant's willingness to take the polygraph test, their testimony evidenced only a brief mention of the fact in jury deliberation and not prolonged discussion, and the record did not evidence that there was any overreaching influence on their verdict that worked any prejudice to the defendant. *Garrett v. State*, 549 So. 2d 1325 (Miss. 1989).

A case cannot be reversed by the supreme court on the ground that the evidence did not show corporate existence where no objection was made on that ground in the court below. *James v. State*, 77 Miss. 370, 26 So. 929, 78 Am. St. R. 527 (1900).

#### 14. —Admission and exclusion.

Any error in admission of testimony of prison guard that defendant confessed to killing victim was harmless in murder prosecution, though such evidence was not timely disclosed to defense, where testimony was cumulative to similar testimony by numerous other witnesses. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Decision whether to admit testimony of witness whose name was not timely disclosed to defense rests largely within discretion of trial court. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Admission of testimony of agent of Federal Bureau of Investigation (FBI) that FBI informant, who was member of Ku Klux Klan, informed him of incriminating statement made by defendant at Klan meeting was not prejudicial error in murder prosecution, though agent's name was not provided to defense until first day of trial; prosecution was not aware before trial that agent was recipient of information about incriminating statement, trial court called recess to allow defense counsel opportunity to question agent, and agent was called to corroborate testimony

of one of several witnesses who had knowledge of inculpatory statements made by defendant. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Admission of testimony of witness regarding racial and derogatory comments defendant made when referring to murder victim, which comments were not included in witness's prior recorded statement, was not prejudicial error in murder prosecution, even if prosecution had knowledge of comments and failed to supplement discovery, where defense counsel cross-examined witness regarding absence of derogatory comments from her recorded statement. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Letters written by defendant to relatives and page from manuscript of book about defendant's life, which expressed defendant's hostile views toward blacks and civil rights leaders and proclaimed his involvement in the Ku Klux Klan, were relevant to establish defendant's motive for killing black leader of civil rights organization, and more probative on such issue than prejudicial, especially as there was no evidence that defendant had ever met victim. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Error in failure to apply proper legal standards in excluding evidence of prior kissing between parties in rape case was harmless; other evidence included that parties were previously acquainted, that defendant was high or intoxicated night of incident, that during sexual encounter victim was injured, that victim ran away from scene in distraught, frantic manner in state of undress, that parties were kissing and fondling on night of incident, and defense failed to demonstrate significance and nature of previous kissing between parties that had been excluded. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

The supreme court, even in a murder case, will not consider an assignment of error predicated upon the admission of



evidence if no objection was made to it in the court below. *Mathis v. State*, 80 Miss. 491, 32 So. 6 (1902).

### 15. —Weight and sufficiency.

Function of jury is to pass upon weight and worth of evidence, and credibility and veracity of witnesses, and supreme court cannot set aside verdict of guilty unless it is clear that such verdict is result of prejudice, bias, or fraud or is manifestly against the weight of the credible evidence. *Ivey v. State*, 206 Miss. 734, 40 So. 2d 609 (1949).

Failure of proof may not be raised for the first time on appeal. *Horn v. State*, 165 Miss. 169, 147 So. 310 (1933).

The statute does not operate in any case to supply proof that an offense has been committed, where the defendant moves for a new trial because the verdict was contrary to the law and evidence. *Bryant v. State*, 65 Miss. 435, 4 So. 343 (1888).

### 16. —Improper remarks and argument of counsel.

Prosecutor's comment to juror during individual voir dire in chambers that defendant did not have to testify did not amount to improper comment on defendant's failure to testify in murder prosecution, where comment was made in response to juror's clear misunderstanding of the law regarding presumption of innocence which she expressed in response to questioning by defense counsel. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Even if prosecutor's comment during closing argument that defendant did not deny ownership of alleged murder weapon was improper comment on defendant's failure to testify, such error was harmless in murder prosecution; evidence of defendant's guilt was overwhelming, including evidence that defendant's rifle was found at scene of murder with his fingerprint on the scope, and court instructed jury on defendant's right not to testify. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Prosecutor's comment during closing argument, in reference to defense counsel's cross-examination of state witness on her

history of family problems, that defense counsel would do anything to get a murderer loose did not amount to prejudicial error in murder prosecution, in light of overwhelming evidence of defendant's guilt. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Fact that prosecution referred to several exhibits as "appellate" exhibits did not amount to reversible error in murder prosecution, despite defendant's contention that such references impressed upon jurors that they were not final judges and their decision was reviewable by another court; defense failed to timely state its objection and request corrective action, and trial judge corrected any error by instructing prosecution to use term "Court's exhibits." *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Prosecutor's closing argument that defendant's accomplices were not being tried because they had been exonerated in prior judicial hearing was proper response to defense counsel's references to the fact that no action was being taken against defendant's accomplices. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's closing argument during guilt phase that "This man deserves everything that he can get for the most brutal murder" and "He's guilty" were not personal opinion comments, as prosecutor never said that she believed that defendant was guilty or that she believed that defendant deserved the death penalty. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence, but arguing statements of fact which are not in evidence or necessarily inferable from it and which are prejudicial to the defendant is error. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).



Prosecuting attorney should refrain from commenting upon appearance of defendant when he has not been introduced as a witness. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecuting attorney should refrain from doing anything or saying anything that would tend to cause jury to disfavor defendant due to matters other than evidence relative to the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's comment on defendant's demeanor and appearance may have highlighted his failure to testify, which is plainly prohibited, and the remark should not have been made. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Any error in prosecutor's comment on defendant's demeanor, which might have been taken as a comment on failure to testify, was cured by instructions to jurors to disregard remarks of counsel which have no basis in the evidence and to not draw any unfavorable inference against defendant because of his failure to testify. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that it was not likely that government witness fabricated his testimony, in that if he had, he would have fabricated a better story; rather, comment merely referred to paucity of evidence supporting defense theory witness was publicity seeker who would fabricate testimony. *Dowbak v. State*, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that defendant could not have committed the crime inasmuch as he was doctor who derived sense of closeness from the community because he was "their" doctor; rather, comment merely referred to pau-

city of evidence supporting that defense theory. *Dowbak v. State*, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that arsonist was blackmailing defendant; rather, comment merely referred to fact that blackmail theory was put forth by defense attorneys rather than by defense witnesses. *Dowbak v. State*, 666 So. 2d 1377 (Miss. 1996).

Capital murder defendant was not prejudiced by prosecutor's statement that the only "correct choice" upon conviction was death penalty; trial court instructed that jury must decide whether defendant should be sentenced to death or to life imprisonment, leaving no question that jurors were fully informed of their options, and jurors were presumed to follow law as instructed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Capital murder defendant was not prejudiced by comment of prosecution, during guilt phase closing argument, inviting jury to notice that on each of several situations in which state was prepared to go forward with proof "that the defense would just as soon not be before you," a stipulation was entered into; immediately thereafter the court instructed prosecutor "don't raise a comment on why the stipulations were made," and defense counsel did not request any further action. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The prosecutor's closing argument in the guilt phase of a capital murder prosecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824 (Miss.

1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A prosecutor's remarks during closing argument did not constitute improper comment on the defendant's decision not to testify where the prosecutor did not comment on the defendant's failure to take the stand, but merely attempted to turn the jury's attention to the defendant's confession to the police which had been admitted into evidence. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In a capital murder trial, the phrase "they haven't shown it" used by the prosecutor in his closing argument with respect to the defendant's alibi defense did not shift the burden of proof from the State to the defendant and deprive him of his right to a presumption of innocence where the prosecutor stated that the alibi instruction required the defendant to be in a place so remote and distant that he could not have committed the offense and "they haven't shown it"; the prosecutor did not tell the jury that the defendant's failure to establish his alibi should automatically translate into a verdict of guilty, but merely stated that the defense had not proven or "shown" that the defendant was "in a place so remote and distant that he could not have committed the offense" at the time when the crime occurred. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130



L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A prosecutor did not improperly comment during closing argument on the defendant's right to remain silent where the prosecutor remarked that the victim could not talk because she was dead and stated that only the defendant and God knew what happened, but he did not observe the defendant's silence during trial; the prosecutor's comments would be a reference to the defendant's failure to testify only if innuendo and insinuation were employed. *Alexander v. State*, 610 So. 2d 320 (Miss. 1992).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

A prosecutor did not improperly comment on the defendant's failure to testify when he stated during closing argument: "That's what you have got before you, and that's all you have got before you. All the evidence in this case points to one thing and one thing only"; the prosecutor's comment related to the evidence presented in

the trial by both the State and defense as a whole, rather than the failure of the defendant to take the stand. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

In a capital murder prosecution, the prosecutor's statement that there had not been any testimony that the defendant acted in self-defense did not constitute an impermissible comment upon the failure of the defendant to testify, where the prosecutor's statement was made in connection with his argument that the State had proved the required element that the defendant's actions were not done in necessary self-defense. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

It was improper for a prosecutor to comment on a burglary defendant's failure to call a witness who was allegedly with the defendant at the time the crime was committed, where there was no suggestion that the witness was not equally available to the State, the witness was not identified as a person under the control of the defendant, and he was not a close relative who would ordinarily be expected to be put in an unacceptable compromising position should he be called to testify as to the validity of the defendant's alibi. *Burke v. State*, 576 So. 2d 1239 (Miss. 1991).

Comments made by a prosecutor during his closing argument in a capital murder prosecution did not constitute prosecutorial misconduct, where the prosecutor stated that the victim was a human being and had a right to be protected by the law even though he may not have been wealthy or prominent or a leader in his community, in spite of the defendant's argument that the "value" of the victim's life should not be a factor in considering whether the defendant should live or die and that such a consideration introduces an arbitrary factor into the process, since the prosecutor's statement was innocuous. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In a murder prosecution, the prosecutor's comment during closing argument that the defendant was "clothed in the full protection of the Constitution of the United States and he has got what [the



victim] never got. And that is a jury of 12 good people to decide his fate," did not warrant reversal of the jury's verdict where the comment was an isolated statement and no other portion of the closing argument focused on the exercise of constitutional rights by the defendant. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In a prosecution for aggravated assault and shooting into a dwelling house, comments made by the district attorney to the effect that no one knew whether the defendant contended that he was not guilty because he didn't shoot the gun into the house or because he did shoot the gun into the house but could not appreciate the wrongfulness of that act, were comments on the defense presented, or lack thereof, rather than comments on the defendant's failure to testify and, therefore, were not improper. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

A prosecutor's remarks during closing argument referring to an expert as a "whore," stating that the expert was paid \$2,000, and that the expert resided outside the state should not have been made but did not constitute reversible error. *Dunaway v. State*, 551 So. 2d 162, 88 A.L.R.4th 203 (Miss. 1989).

The prohibition against "golden rule" arguments, which ask the jurors to put themselves in the place of one of the parties, extends to criminal cases. *Chisolm v. State*, 529 So. 2d 635 (Miss. 1988).

A prosecutor's improper remarks during closing argument regarding race did not warrant a reversal of conviction where the jury did not return a life sentence against the defendant as requested by the prosecutor and where there was overwhelming evidence of the defendant's guilt of the crime charged. *Herring v. State*, 522 So. 2d 745 (Miss. 1988).

The failure to obtain rulings from the trial court on objections to alleged improper argument of counsel waived the objections. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct.

826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

Permitting district attorney in his closing argument to refer to defendant in prosecution for murder as a "black gorilla," is reversible error. *Harris v. State*, 209 Miss. 141, 46 So. 2d 91 (1950).

Conviction will not be disturbed for improper argument unless bill of exceptions taken at time shows remarks prejudicial. *McLeod v. State*, 130 Miss. 83, 92 So. 828 (1922).

### 17. Matters pertaining to record.

The many cases cited under Code 1972, § 11-51-87 holding that the supreme court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in the record on appeal are overruled because of two statutes — Code 1972, § 11-3-35 and this section — which were apparently overlooked by the early cases. *Avera v. State*, 300 So. 2d 787 (Miss. 1974).

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515 (1953).

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So.

2d 492 (1941), error overruled, 190 Miss. 882, 2 So. 2d 148 (1941).

Justice court record which included copy of affidavit, warrant for arrest, appearance bond, and judgment, with justice's certificate that such was a true and correct copy, held sufficient to give circuit court jurisdiction of appeal. *Stewart v. State*, 179 Miss. 31, 174 So. 579 (1937).

Where record did not contain judgment of justice court, appeal bond, or transcript of proceedings in justice court, but such transcript was unnecessary for understanding of proceedings in circuit court, statute prevents reversal. *McCluney v. State*, 162 Miss. 333, 138 So. 356 (1931).

Statute required presumption that proper appeal bond was executed by one appealing from justice court requiring his attendance at court until appeal was disposed of. *McCluney v. State*, 162 Miss. 333, 138 So. 356 (1931).

Without judgment of circuit court showing establishment, it is presumed certification of record was not established in circuit court on appeal from justice. *Brasham v. State*, 140 Miss. 712, 106 So. 280 (1925).

Assignments without basis in record will not be considered. *Higgins v. State*, 120 Miss. 823, 83 So. 245 (1919).

## 18. Other acts or crimes.

Admission of testimony of prison guard that while defendant was incarcerated for another offense, he confessed to murder of black civil rights leader was not reversible error in prosecution for such murder, despite fact that conviction for which defendant was incarcerated was subsequently vacated as unconstitutional; guard made no reference to details of crime for which defendant was incarcerated, and previous offense was not similar or identical to charged crime. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Even if state witness's general reference to bombings, in response to question on direct examination regarding defendant's statements about murder of black leader of civil rights organization, was improper evidence of other crimes, such testimony was not prejudicial in prosecution for such murder; answer was unresponsive, and prosecutor thereafter directed witness's testimony towards matters involving murder victim. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

## RESEARCH REFERENCES

**ALR.** Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—*Parker cases*. 35 A.L.R.4th 890.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 A.L.R.5th 531.

What constitutes harmless or plain er-

ror under Rule 52 of the Federal Rules of Criminal Procedure — Supreme Court cases. 157 A.L.R. Fed. 521.

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 705 et seq.

**Lawyers' Edition.** Supreme Court Cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 2:2.

## § 99-35-145. Repealed.

Repealed by Laws, 1984, ch. 378, § 18, eff from and after April 17, 1984.  
[Codes, 1942, § 1992.5; Laws, 1952, ch. 250, §§ 1-10]

**Editor's Note** — Former § 99-35-145 was entitled: Coram nobis after affirmance of conviction; appeal from grant or denial of writ.

Mississippi Uniform Post-Conviction Collateral Relief Act, En Laws, 1984, ch. 378, eff from and after April 17, 1984, codified at §§ 99-39-1 et seq., repealed statutory writ of error coram nobis and abolished common law writs relating to post-conviction collateral relief.



## CHAPTER 36

### Victim Assistance Coordinator

SEC.	
99-36-1.	Purpose.
99-36-3.	Definitions.
99-36-5.	Rights of victim, guardian of victim, or close relative of deceased victim within criminal justice system.
99-36-7.	Victim assistance coordinator; duties; salary; county victim assistance coordinator; duties; multi-county coordinator; participation by municipalities; federal grants.

#### § 99-36-1. Purpose.

The purpose of this chapter is to ensure the fair and compassionate treatment of victims and witnesses of crime and to increase the effectiveness of the criminal justice system by affording certain basic rights and considerations to the victims and witnesses of crime who are essential to prosecution.

**SOURCES:** Laws, 1987, ch. 467, § 1; reenacted without change, 1990, ch 486, § 1; reenacted, 1993, ch. 331, § 1, eff from and after passage (approved March 12, 1993).

**Editor's Note** — Laws of 1990, ch. 486, § 5, provided for the repeal of this chapter from and after September 1, 1993. Subsequently, Laws of 1993, ch. 331, § 5, amended Laws of 1990, ch. 486, § 5, to delete the repeal provision.

#### § 99-36-3. Definitions.

The following terms shall have the meanings ascribed herein, unless the context dictates otherwise:

(a) "Victim" means any person against whom a felony has been committed or attempted;

(b) "Close relative of a deceased victim" means a person who was the spouse of a deceased victim at the time of the victim's death or who is a parent or adult brother, sister or child of the deceased victim; and

(c) "Guardian of a victim" means a person who is the legal guardian of the victim, where the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.

**SOURCES:** Laws, 1987, ch. 467, § 2; reenacted without change, 1990, ch 486, § 2; reenacted, 1993, ch. 331, § 2, eff from and after passage (approved March 12, 1993).

#### § 99-36-5. Rights of victim, guardian of victim, or close relative of deceased victim within criminal justice system.

(1) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

(a) The right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts, including, but not limited to, the filing of criminal charges where the perpetrator is known;

(b) The right to have a circuit or county court judge take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;

(c) The right to be informed of relevant court proceedings and to be informed if those court proceedings have been canceled or rescheduled prior to the event;

(d) The right to be informed, when requested, by the district attorney's office concerning the general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements;

(e) The right to provide a victim impact statement prior to any sentencing of the offender; and

(f) The right to receive information regarding compensation to victims of crime as may be provided by law.

(2) A victim, guardian of a victim or close relative of a deceased victim has the right to be present at all public court proceedings related to the prosecution of the accused, consistent with the rules of evidence.

(3) A judge, attorney for the state, peace officer or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this chapter. The failure or inability of any person to provide a right or service enumerated in this chapter may not be used by a defendant in a criminal case as a ground for appeal. A victim, guardian of a victim, or close relative of a deceased victim does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.

**SOURCES:** Laws, 1987, ch. 467, § 3; reenacted and amended, 1990, ch 486, § 3; reenacted, 1993, ch. 331, § 3, eff from and after passage (approved March 12, 1993).

**Cross References** — Victim's right to provide victim impact statement for use by court in sentencing a criminal defendant, see §§ 99-19-151 through 99-19-161.

Duty of victim assistance coordinator to ensure that parties are afforded the rights granted by this section, see § 99-36-7.

Restitution to victims of crime, see §§ 99-37-1 et seq.

## RESEARCH REFERENCES

**ALR.** Emotional manifestations by victim or family of victim during criminal trial as grounds for reversal, new trial, or mistrial. 31 A.L.R.4th 229.

Governmental tort liability for failure to provide police protection to specifically

threatened crime victim. 46 A.L.R.4th 948.

Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

**§ 99-36-7. Victim assistance coordinator; duties; salary; county victim assistance coordinator; duties; multi-county coordinator; participation by municipalities; federal grants.**

(1)(a) In addition to the full-time legal assistants to the district attorney authorized by Section 25-31-5, the district attorney in each circuit court district in this state shall, subject to the approval of and upon the order of the senior circuit court judge of the district, employ one (1) person to serve at the will and pleasure of the district attorney-as a "victim assistance coordinator" who shall not be considered to be a state employee.

(b) The District Attorney of the First Circuit Court District may appoint one (1) additional victim assistance coordinator subject to the approval of and upon the order of the senior circuit court judge of the district for a total of two (2) victim assistance coordinators.

(2) The duty of the victim assistance coordinator is to ensure that a victim, guardian of a victim, or close relative of a deceased victim is afforded the rights granted victims, guardians and relatives by Section 99-36-5. The victim assistance coordinator shall work closely with appropriate law enforcement agencies, prosecuting attorneys, the state and the judiciary in fulfilling that duty.

(3) The salary of the victim assistance coordinator shall not exceed the salary authorized for criminal investigators in Section 25-31-10, and shall be paid jointly by the counties comprising the circuit court district, with each county paying a pro rata share of the salary as determined by the senior circuit court judge.

(4) The board of supervisors of any county, with the approval of and upon the order of the senior circuit court judge of the district wherein such county lies, may, in addition to any victim assistance coordinator provided for in subsection (1) of this section, create the position of county victim assistance coordinator. The duty of the county victim assistance coordinator shall be to cooperate with local law enforcement agencies, the county attorney and the district attorney in assuring that a victim, guardian or close relative is afforded the rights granted by Section 99-36-5. Two (2) or more counties, by action of their respective boards of supervisors, with the approval of and upon the order of the senior circuit court judge of the district wherein such counties lie, may join in establishing and maintaining the position of victim assistance coordinator to serve these counties. Any municipality, by action of its governing authority, may participate in the establishment and maintenance of a county victim assistance coordinator's office located within the municipality.

(5) Any district attorney, county board of supervisors or governing authority of a municipality which has established or is participating in the maintenance of an office of victim assistance coordinator may apply through the Governor's Office of State and Federal Programs for a grant under the federal "Victims of Crimes Act of 1984" (Public Law 98-473) to be used in the continued operation of the victim assistance program.



**SOURCES:** Laws, 1987, ch. 467, § 4; reenacted and amended, 1990, ch. 486, § 4; reenacted, 1993, ch. 331, § 4; Laws, 1997, ch. 429, § 1, eff from and after October 1, 1997.

**Cross References** — First Circuit Court District composition, see § 9-7-5.

Rights of victim, guardian of victim, or close relative of deceased victim within justice system, see § 99-36-5.

**Federal Aspects** — Victims of Crime Act of 1984, see 42 USCS §§ 10601 note, 10601-10603.

### ATTORNEY GENERAL OPINIONS

Inherent in the district attorney's authority to hire a victims' assistance coordinator is the authority to set the coordinator's salary, but the pro rata share of such salary to be paid by the counties must be determined by the senior circuit court judge. Mitchell, Feb. 19, 1992, A.G. Op. #92-0027.

It is responsibility of district attorney's office to pay for necessary supplies and equipment required to discharge duties of victim assistance coordinator. Griffith, August 11, 1993, A.G. Op. #93-0453.

## CHAPTER 37

### Restitution to Victims of Crimes

SEC.

- 99-37-1. Definitions.
- 99-37-3. Imposition and amount of restitution.
- 99-37-5. Payment; order; enforcement.
- 99-37-7. Treatment of default in payment as contempt; judicial officer not liable for failure of defendant to pay fine or make restitution.
- 99-37-9. Term of imprisonment for contempt.
- 99-37-11. Relief from payment.
- 99-37-13. Enforcement of judgment.
- 99-37-15. Resumption of payment upon release from custody.
- 99-37-17. Civil actions by victims; evidence; damages.
- 99-37-19. Restitution centers [Repealed effective July 1, 2011].
- 99-37-21. Powers and duties of public welfare and corrections departments as to restitution centers.
- 99-37-23. Restitution in delinquency cases.
- 99-37-25. Payment by Division of Victim Compensation of costs associated with medical forensic examination and sexual assault evidence collection kit; defendant to make restitution to Division of Victim Compensation.

#### § 99-37-1. Definitions.

As used in this chapter:

(a) “Criminal activities” shall mean any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant.

(b) “Pecuniary damages” shall mean all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant’s criminal activities and shall include, but not be limited to, the money equivalent of property taken, destroyed, broken or otherwise harmed, and losses such as medical expenses.

(c) “Restitution” shall mean full, partial or nominal payment of pecuniary damages to a victim.

(d) “Victim” shall mean any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities. “Victim” shall not include any coparticipant in the defendant’s criminal activities, or any person knowingly participating in a criminal act at the time he became a victim.

**SOURCES:** Laws, 1978, ch. 400, § 1; Laws, 1992, ch. 422, § 1, eff from and after passage (approved May 4, 1992).

**Cross References** — Community service restitution, see §§ 99-20-1.

Restitution to owner for malicious injury or death of certain animals, see § 97-41-15.  
Mississippi Crime Victims’ Compensation Act, see §§ 99-41-1 et seq.

## JUDICIAL DECISIONS

The payment of restitution is not limited only to the person who has been directly injured by a guilty party; the payment of restitution can also be extended to members of the victim's family who suffer pecuniary damages. *Butler v. State*, 544 So. 2d 816 (Miss. 1989).

The ordering of child support to a vic-

tim's child is a type of special damages that is encompassed under § 99-37-1. The fixing of child support restitution may by analogy resort to the law regarding setting the amount of child support in divorce cases. *Butler v. State*, 544 So. 2d 816 (Miss. 1989).

## ATTORNEY GENERAL OPINIONS

A municipal court judge may order restitution in a criminal case for the full amount of pecuniary damages suffered by

a victim. *Smallwood*, Jan. 23, 2004, A.G. Op. 04-0009.

## RESEARCH REFERENCES

**ALR.** Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

Persons or entities entitled to restitution as "victim" under state criminal restitution statute. 92 A.L.R.5th 35.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

1989 Mississippi Supreme Court Review: Statutory Interpretation. 59 Miss. L. J. 876, Winter, 1989.

## § 99-37-3. Imposition and amount of restitution.

(1) When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; provided, however, that the justice court shall not order restitution in an amount exceeding Five Thousand Dollars (\$5,000.00).

(2) In determining whether to order restitution which may be complete, partial or nominal, the court shall take into account:

(a) The financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant;

(b) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; and

(c) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(3) If the defendant objects to the imposition, amount or distribution of the restitution, the court shall, at the time of sentencing, allow him to be heard on such issue.

(4) If the court determines that restitution is inappropriate or undesirable, an order reciting such finding shall be entered, which should also state the underlying circumstances for such determination.



**SOURCES:** Laws, 1978, ch. 400, § 2; Laws, 1990, ch. 379, § 1; Laws, 2003, ch. 314, § 1, eff from and after July 1, 2003.

**Cross References** — Power to punish for contempt, see §§ 9-1-17, 9-11-15.

Power of court to determine conditions of probation, see § 47-7-35.

Restitution to owner of stolen livestock as part of penalty for crime, see § 97-17-53.

Ordering restitution upon one convicted of passing bad checks, see § 97-19-67.

Resumption of payment upon release from custody, see § 99-37-15.

Restitution by one convicted of certain sexual offenses of amount paid for initial medical examination of victim, see § 99-37-25.

Crime Victims' Compensation Fund, see §§ 99-41-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Where defendant was informed in open court by the trial court of the restitution payments imposed as a part of his sentence and responded with a "Yes, sir" when told he had to make the payments, without any objection, he waived any right to raise an objection to the amount of restitution ordered on appeal. *Willis v. State*, 904 So. 2d 200 (Miss. Ct. App. 2005).

In a homicide prosecution resulting in a conviction for manslaughter, an order of restitution in the amount of \$12,828.50 was error where there was no evidence that the trial judge considered the factors set forth in subsection (2) of this section, the trial judge did not specify a time for payment or a method of payment, and there was no express finding that the defendant had assets to pay any part of the amount ordered, though the judge implicitly found that the defendant had assets to pay part of the restitution amount by directing that a lien be placed against the defendant's workers' compensation benefits. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

The payment of restitution is not limited only to the person who has been directly injured by a guilty party; the payment of restitution can also be extended to members of the victim's family who suffer pecuniary damages. *Butler v. State*, 544 So. 2d 816 (Miss. 1989).

Although the authority to impose restitution flows from the adjudication of guilt or the defendant's plea of guilty, that is not to say that restitution may not be imposed at any stage of the criminal process through informal government-san-

ctioned compromises and settlements between the offender and the victim so long as detention is not used to induce an agreement. *Butler v. State*, 544 So. 2d 816 (Miss. 1989).

Sunsections (3) and (4) of this section indicate the necessity for a hearing before restitution can be assessed. The type of hearing is not specified, but would require at a minimum, (1) notice to the defendant that victim restitution was being considered by the court, (2) the nature of such restitution considered, (3) an opportunity to the defendant to be heard and to object, and (4) a finding by the court to afford adequate appellate review. *Butler v. State*, 544 So. 2d 816 (Miss. 1989).

The language in subsection (3) of this section infers that a defendant must object to the imposition of restitution at the time of sentencing. Thus, the imposition of restitution was not reversed even though the judge erred in using facts not in evidence to determine the amount of restitution where the defendant failed to object to the restitution at the time of sentencing. *Powell v. State*, 536 So. 2d 13 (Miss. 1988).

A trial court had the authority to authorize an award of fines, court costs, medical expenses and attorney's fees under this section and § 99-37-5. *Powell v. State*, 536 So. 2d 13 (Miss. 1988).

Sentence was neither excessive nor beyond the court's authority which required the defendant, who was convicted of a violation of § 97-3-19, to serve 30 days in the county jail, perform 60 days of community work, pay costs of special election, and pay costs of trial, as conditions for the suspension of a one year sentence and 2

years of probation. *Fanning v. State*, 497 So. 2d 70 (Miss. 1986).

### ATTORNEY GENERAL OPINIONS

This section refers generally to "the court's" power to make restitution, and does not differentiate between types of courts; therefore, municipal court may order restitution in criminal case. *Gorrell*, Mar. 3, 1993, A.G. Op. #93-0086.

This section limits justice courts to restitution of up to \$1,000. *Gorrell*, Mar. 3, 1993, A.G. Op. #93-0086.

If defendant is charged with misdemeanor involving fraud, found guilty and wishes to make restitution, Justice Court is limited to \$1,000.00 restitution, even

though amount of fraud is above \$1,000.00. *Phillips* Sept. 9, 1993, A.G. Op. #93-0565.

A video-rental store qualifies for restitution as a victim of a larceny under a lease or rental agreement. *Aldridge*, March 3, 2000, A.G. Op. #2000-0104.

A municipal court judge may order restitution in a criminal case for the full amount of pecuniary damages suffered by a victim. *Smallwood*, Jan. 23, 2004, A.G. Op. 04-0009.

### RESEARCH REFERENCES

**ALR.** Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal. 36 A.L.R.3d 839.

Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 944 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

### § 99-37-5. Payment; order; enforcement.

(1) When a defendant is sentenced to pay a fine or costs or ordered to make restitution, the court may order payment to be made forthwith or within a specified period of time or in specified installments. If a defendant is sentenced to a term of imprisonment, an order of payment of a fine, costs or restitution shall not be enforceable during the period of imprisonment unless the court expressly finds that the defendant has assets to pay all or part of the amounts ordered at the time of sentencing.

(2) When a defendant sentenced to pay a fine or costs or ordered to make restitution is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs or the making of restitution a condition of probation or suspension of sentence. Such offenders shall make restitution payments directly to the victim. As an alternative to a contempt proceeding under Sections 99-37-7 through 99-37-13, the intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant's probation and may be cause for revocation of his probation or suspension of sentence.

**SOURCES:** Laws, 1978, ch. 400, § 3; Laws, 1979, ch. 462, § 5, eff from and after July 1, 1979.

**Cross References** — Requiring restitution concomitant with probation, see § 47-7-47.

Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors or felonies, see § 99-19-73.

## JUDICIAL DECISIONS

### 1. In general.

Joint and several liability of restitution has been consistently upheld as to criminal co-defendants who act in concert, and thus the trial court's order that the inmate pay his co-defendant's part of the restitution if she failed to pay it was not in error; therefore, the order of restitution was affirmed. *Craft v. State*, 955 So. 2d 384 (Miss. Ct. App. 2006).

In a homicide prosecution resulting in a conviction for manslaughter, an order of restitution in the amount of \$12,828.50 was error where there was no evidence that the trial judge considered the factors set forth in § 99-37-3(2), the trial judge did not specify a time for payment or a method of payment, and there was no express finding that the defendant had assets to pay any part of the amount ordered, though the judge implicitly found that the defendant had assets to pay part of the restitution amount by directing that a lien be placed against the defendant's workers' compensation benefits. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

A trial judge in a homicide prosecution erred by ordering a claim against the defendant's workers' compensation benefits to secure payment of restitution since § 71-3-43 provides that workers' compensation benefits are exempt from all creditors' claims and from any remedy for recovery of a debt; moreover, under § 99-37-13, imposition of levy of execution for the collection of restitution is not authorized until the defendant is in default in his payment, and the defendant could not have been in default since the order of restitution was not yet enforceable where the defendant was also sentenced to imprisonment and the trial judge did not expressly find that he had assets to pay the amount ordered. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

A trial court had the authority to authorize an award of fines, court costs, medical expenses and attorney's fees under § 99-37-3 and this section. *Powell v. State*, 536 So. 2d 13 (Miss. 1988).

## ATTORNEY GENERAL OPINIONS

The fact that this section directs restitution payments directly to the victim reflects the Legislature's intention that such payments not be made through the court system. Therefore, the municipal court judge, with the permission of the

victim, may, as a condition of suspension of sentence, require a defendant to pay restitution to a third party as trustee for the victim. *Miller*, April 11, 1995, A.G. Op. #95-0208.

## RESEARCH REFERENCES

**ALR.** Ability to pay as necessary consideration in conditioning probation or suspended sentence upon reparation or restitution. 73 A.L.R.3d 1240.

Propriety of condition of probation which requires defendant convicted of

crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs. 79 A.L.R.3d 1025.

Criminal liability under state laws in



connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

Availability of discovery at probation revocation hearings. 52 A.L.R.5th 559.

**Am Jur.** 21A Am. Jur. 2d, Criminal Law §§ 926, 944 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

### **§ 99-37-7. Treatment of default in payment as contempt; judicial officer not liable for failure of defendant to pay fine or make restitution.**

(1) When a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or the restitution, or a specified part thereof, is paid.

(3) A judicial officer shall not be held criminally or civilly liable for failure of any defendant to pay any fine or to make restitution if the officer exercises his judicial authority in accordance with subsections (1) and (2) of this section to require the payment of such fine or restitution.

(4) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

**SOURCES:** Laws, 1978, ch. 400, § 4 (1-3); Laws, 1991, ch. 481, § 1, eff from and after July 1, 1991.

**Cross References** — Appeals from contempt judgments, see § 11-51-11.

### **ATTORNEY GENERAL OPINIONS**

Assuming defendant is not indigent, court may make payment of fine and/or court cost condition of probation or suspension of jail sentence, and may issue citation or warrant of arrest for defendant whose court ordered fine is delinquent, for appearance to show cause why default should not be treated as contempt of court; if court determines that default was inten-

tional refusal to obey court order, or defendant did not make good faith effort to make payment, court may find defendant's default constitutes contempt of court and may order defendant committed until fine or specific part thereof is paid. Nash, Sept. 23, 1992, A.G. Op. #92-0736.

Section 99-37-11 can only be used to revoke a fine if the defendant shows that

his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment pursuant to this section. There is no authority for such fines to be excused simply due to their age or the fact that the defendant left the state. Lipscomb, April 12, 1996, A.G. Op. #96-0197.

This section addresses the issue of a default of payment and states that such a default may be treated as contempt. Creekmore, June 14, 1996, A.G. Op. #96-0377.

A judge, on his own motion, may issue a show cause citation or an arrest warrant for a defendant that has defaulted on the payment of a fine no matter when the fine was imposed; the judge should examine all evidence at his disposal and use judicial discretion in determining whether a warrant should be issued. Thompson, Apr. 27, 2001, A.G. Op. #01-0255.

Subsection (1) of this section and § 19-3-41(4) may be used to collect delinquent payments which consist of constable fees. Busby, July 23, 2004, A.G. Op. 04-0316.

## RESEARCH REFERENCES

**ALR.** Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous. 12 A.L.R.2d 1059.

Limitations statute applicable to criminal contempt proceedings. 38 A.L.R.2d 1131.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions. 72 A.L.R.2d 431.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 448.

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error. 33 A.L.R.3d 589.

Right to counsel in contempt proceedings. 52 A.L.R.3d 1002.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

**Am Jur.** 17 Am. Jur. 2d, Contempt, §§ 48, 58, 145, 146, 148, 191, 210.

7 Am. Jur. Pl & Pr Forms (Rev), Contempt, Form 51 (affidavit of contempt for disobedience of court order); Forms 101, 110 (show cause order for disobedience of court order); Forms 151, 153 (judgment or order of contempt); Form 232 (counter-affidavit alleging inability to comply with judgment or order); Form 261 (certiorari to review judgment of contempt).

**CJS.** 17 C.J.S., Contempt § 15.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

## § 99-37-9. Term of imprisonment for contempt.

The term of imprisonment for contempt for failure to make restitution shall be set forth in the commitment order, and shall not exceed one (1) day for each twenty-five dollars (\$25.00) of the restitution, or thirty (30) days if the order of the restitution was imposed upon conviction of a violation or misdemeanor, or one (1) year in any other case, whichever is the shorter period. A person committed for failure to make restitution shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

**SOURCES:** Laws, 1978, ch. 400, § 4(4); Laws, 1979, ch. 501, § 3, eff from and after passage (approved April 18, 1979).

## RESEARCH REFERENCES

**Am Jur.** 17 Am. Jur. 2d, Contempt §§ 206-208.

7 Am. Jur. Pl & Pr Forms (Rev), Contempt, Form 191 (order of imprisonment until contempt purged); Form 211 (commitment order); Form 251 (undertaking to secure release of persons arrested in contempt proceeding); Forms 271, 272 (affidavit in support of motion for release);

Forms 274, 275 (order discharging defendant from custody).

**CJS.** 17 C.J.S., Contempt §§ 111, 112, 117 et seq.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

## § 99-37-11. Relief from payment.

If it appears to the satisfaction of the court that the default in the payment of a fine or restitution is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part.

**SOURCES:** Laws, 1978, ch. 400, § 4(5), eff from and after July 1, 1978.

**Cross References** — Suspension of sentence, see §§ 99-19-25 et seq.

Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors or felonies, see § 99-19-73.

## ATTORNEY GENERAL OPINIONS

This section can only be used to revoke a fine if the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment pursuant to Section 99-37-7. There is no authority for such fines to be excused simply due to their age or the fact that the defendant

left the state. Lipscomb, April 12, 1996, A.G. Op. #96-0197.

A trial court judge may revoke a fine under the statute upon a finding that an indigent defendant who has defaulted on a fine imposed by the court did not default as a result of contempt. Little, April 17, 1998, A.G. Op. #98-0209.

## RESEARCH REFERENCES

**Am Jur.** 21A Am. Jur. 2d, Criminal Law § 927.

**CJS.** 17 C.J.S., Contempt §§ 123 et seq. (remission of fine or discharge from custody).

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

## § 99-37-13. Enforcement of judgment.

A default in the payment of a fine or costs or failure to make restitution or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine



or restitution shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine or restitution has actually been collected.

**SOURCES:** Laws, 1978, ch. 400, § 4(6), eff from and after July 1, 1978.

**Cross References** — Property exempt from execution to satisfy judgment or order of contempt, see § 85-3-1.

## JUDICIAL DECISIONS

### 1. In general.

A trial judge in a homicide prosecution erred by ordering a claim against the defendant's workers' compensation benefits to secure payment of restitution since § 71-3-43 provides that workers' compensation benefits are exempt from all creditors' claims and from any remedy for recovery of a debt; moreover, under this section, imposition of levy of execution for

the collection of restitution is not authorized until the defendant is in default in his payment, and the defendant could not have been in default since the order of restitution was not yet enforceable where the defendant was also sentenced to imprisonment and the trial judge did not expressly find that he had assets to pay the amount ordered. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

## ATTORNEY GENERAL OPINIONS

Although Home Rule gives counties broad authority in matters of local concern, Home Rule does not authorize counties to hire collection agencies to collect delinquent justice court fines in contravention of specific statutory procedures available to justice courts to collect outstanding fines. *Smith*, March 8, 1990, A.G. Op. #90-0158.

This section allows a criminal judgment sentencing a person to pay a fine, assessments, costs, bond fees or restitution, to be enrolled on the judgment roll. It also allows a criminal defendant's wages to be garnished after default in payment of the fine or other charge. *Dunn*, Feb. 26, 1992, A.G. Op. #91-0131.

Criminal defendant's wages can be garnished after default in payment of fine or other charge. *Lamar*, July 8, 1993, A.G. Op. #93-0385.

Municipal court is authorized to collect criminal fines by any means authorized by law for enforcement of judgment and court can not merely write off uncollected fines as "bad debt". *Hankins*, July 21, 1993, A.G. Op. #93-0448.

Judge may issue warrant of arrest to bring individual who refuses to pay court costs before court and in addition, court may employ any means authorized by law for enforcement of judgment to collect outstanding fines and court costs pursuant to this section. *Pearson*, March 9, 1994, A.G. Op. #94-0127.

A justice court has the authority to issue a garnishment to collect a fine that has been imposed upon a conviction of a traffic offense but has not been paid by the offender. *Fillingane*, Oct. 5, 2001, A.G. Op. #01-0637.

## RESEARCH REFERENCES

**ALR.** Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

**Am Jur.** 29 Am. Jur. 2d, Evidence §§ 404 et seq. (admissibility of criminal conviction).

47 Am. Jur. 2d, Judgments §§ 728 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March 1979.

**§ 99-37-15. Resumption of payment upon release from custody.**

Whenever an offender in the custody of the Department of Corrections is paroled, placed on earned probation or other form of release, and when such offender has been sentenced to make restitution pursuant to Section 99-37-3 but with respect to whom payment of all or a portion of the restitution was suspended until his release from confinement, the making of restitution shall be a condition of the offender's release. The commissioner of corrections shall establish a schedule by which payment of the restitution may be resumed. In fixing the schedule and supervising the released offender's performance thereunder, the commissioner shall consider the factors specified in subsection (2) of Section 99-37-3. The commissioner shall provide to the sentencing court a copy of the schedule and any modifications thereof. Such offenders shall make restitution payments directly to the victim.

As an alternative to a contempt proceeding under Sections 99-37-7 through 99-37-13, the intentional refusal to obey the restitution order or a failure by an offender to make a good faith effort to make such restitution may be considered a violation of an offender's release and may be cause for revocation of his parole, earned probation or other form of release.

**SOURCES:** Laws, 1978, ch. 400, § 5; Laws, 1979, ch. 462, § 6; Laws, 1982, ch. 431, § 7, eff from and after July 1, 1982.

**Cross References** — Department of Corrections generally, see §§ 47-5-1 et seq.

Commissioner of Corrections powers and duties generally, see § 47-5-28.

Notice requirement prior to release of offenders, see § 47-5-177.

Probation and parole law generally, see §§ 47-7-1 et seq.

**RESEARCH REFERENCES**

**ALR.** Availability of discovery at probation revocation hearings. 52 A.L.R.5th 559.

**Am Jur.** 59 Am. Jur. 2d, Pardon and Parole §§ 96, 124.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

**§ 99-37-17. Civil actions by victims; evidence; damages.**

(1) Nothing in this chapter limits or impairs the right of a person injured by a defendant's criminal activities to sue and recover damages from the defendant in a civil action. Evidence that the defendant has paid or been ordered to pay restitution pursuant to this chapter may not be introduced in any civil action arising out of the facts or events which were the basis for the restitution. However, the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in such civil action.

(2) If conviction in a criminal trial necessarily decides the issue of a defendant's liability for pecuniary damages of a victim, that issue is conclu-

sively determined as to the defendant, if it is involved in a subsequent civil action.

**SOURCES:** Laws, 1978, ch. 400, § 6, eff from and after July 1, 1978.

### ATTORNEY GENERAL OPINIONS

Person injured in assault has right to sue and recover damages from defendant's criminal activity notwithstanding that de-

fendant may have been ordered to pay restitution. Pearson, Sept. 16, 1992, A.G. Op. #92-0611.

### RESEARCH REFERENCES

**ALR.** Conviction or acquittal as evidence of the facts on which it was based in civil action. 18 A.L.R.2d 1287.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

**Am Jur.** 22 Am. Jur. 2d, Damages §§ 81, 172, 206, 228 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Damages, Forms 111 et seq. (complaints and

allegations as to exemplary or punitive damages); Forms 301 et seq. (instructions as to exemplary or punitive damages).

**CJS.** 25 C.J.S., Damages §§ 201, 286 (exemplary damages for criminal acts).

31A C.J.S., Evidence § 479.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

**§ 99-37-19. Restitution centers [Repealed effective July 1, 2011].**

The boards of supervisors of the several counties and the governing authorities of municipalities are hereby authorized to cooperate with the Department of Corrections in the establishment of restitution centers. Such centers may house both probationers referred by the circuit courts as well as inmates transferred from other facilities of the Department of Corrections as provided in Section 47-5-110. In order to qualify for placement in a restitution center, an offender must: (a) be convicted of a nonviolent offense that constitutes a felony, (b) not be convicted of a sex crime, and (c) not have drug, alcohol, emotional or physical problems so serious that the offender appears unlikely to meet obligations of the restitution program. Such centers shall be operated by the Department of Corrections. County or municipal property may be utilized with the approval of the board of supervisors or municipal governing authority for the construction, renovation and maintenance of facilities owned by the state or a local political subdivision. Such facility may be leased to the Department of Corrections for a period of time for use as a restitution center.

It is the intent of this section that county and local governments contribute only to the establishment, renovation and maintenance of the physical plant of a restitution center and that the Department of Corrections support the operation of, and have sole jurisdiction over and responsibility for offenders in, such restitution program.

This section shall stand repealed on July 1, 2011.



**SOURCES:** Laws, 1978, ch. 400, § 7; Laws, 1986, ch. 428, § 2; Laws, 2003, ch. 552, § 1; Laws, 2005, ch. 376, § 1; Laws, 2007, ch. 350, § 1, eff from and after passage (approved Mar. 15, 2007.)

**Amendment Notes** — The 2005 amendment extended the date of the repealer from “July 1, 2005” until “July 1, 2007”; and made a minor punctuation change.

The 2007 amendment extended the date of the repealer in the last paragraph from “July 1, 2007” until “July 1, 2011.”

**Cross References** — Establishment of restitution centers from expenditures from community service revolving fund, see § 47-7-49.

### RESEARCH REFERENCES

**ALR.** Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

## § 99-37-21. Powers and duties of public welfare and corrections departments as to restitution centers.

(1) The department of public welfare and the department of corrections are hereby authorized to cooperate in the institution and administration of services at restitution centers as authorized by Section 99-37-19 and at other facilities which provide opportunities for restitution for criminal acts.

(2) The department of public welfare and the department of corrections are authorized and directed, jointly or separately:

(a) to seek funding from federal or other sources to provide the maximum supportive services for offenders and the families of offenders who are participating in restitution programs;

(b) to develop additional programs whereby offenders may be afforded opportunities to contribute to society and the support of their families through restitution programs; and

(c) to develop pilot programs of counseling, training and supervision for parolees whereby restitution may be accomplished; such programs may be residential or nonresidential as appropriate.

**SOURCES:** Laws, 1978, ch. 400, § 8(1), (2), eff from and after July 1, 1978.

### RESEARCH REFERENCES

**ALR.** Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

## § 99-37-23. Restitution in delinquency cases.

In delinquency cases before the youth court, the disposition order may include, in addition to any other requirement, restitution not in excess of actual damages caused by the child to be paid out of his assets or by

performance of services acceptable to the parties and reasonably capable of performance within one (1) year.

**SOURCES:** Laws, 1978, ch. 400, § 8(3), eff from and after July 1, 1978.

**Cross References** — Disposition alternatives in delinquency cases, see § 43-21-605.

Power to order parents to pay child's expenses and restitution, see § 43-21-619.

## RESEARCH REFERENCES

**ALR.** Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

### **§ 99-37-25. Payment by Division of Victim Compensation of costs associated with medical forensic examination and sexual assault evidence collection kit; defendant to make restitution to Division of Victim Compensation.**

(1)(a) When a person is brought into a doctor's office, a hospital or a medical clinic by a law enforcement agency as the victim of an alleged rape or sexual assault having occurred in this state, or comes into a doctor's office, a hospital or a medical clinic alleging rape or sexual assault having occurred in this state, the bill for the medical forensic examination and the preparation of the sexual assault evidence collection kit will be sent to the Division of Victim Compensation, Office of the Attorney General. The Division of Victim Compensation shall pay for the medical examination conducted for the procurement of evidence to aid in the investigation and prosecution of the alleged offense. Such payment shall be limited to the customary and usual hospital and physician charges for such services in the area. Such payment shall be made by the Division of Victim Compensation directly to the health care provider. No bill for the examination will be submitted to the victim, nor shall the medical facility hold the victim responsible for payment. The victim may be billed for any further medical services not required for the investigation and prosecution of the alleged offense. In cases where the damage caused by the alleged sexual assault requires medical treatment or diagnosis in addition to the examination, the patient will be given information about the availability of victim compensation and the procedure for applying for such compensation.

(b) Upon application submitted by the district attorney, provided the proper warrant or court order has been issued, the county in which an offense of sexual assault or of felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, exploitation of children as described in Section 97-5-33 or sexual battery as described in Section 97-3-95, or statutory rape as defined in Section 97-3-65, or an attempt to commit such offense has occurred shall pay for a medical forensic examination of the

person arrested, charged or convicted of such offense to determine if the person so arrested, charged or convicted has any sexually transmitted disease and for the collection of evidence. Such payment shall be made by the county directly to the health care provider or other service performing the collection of evidence and tests. At the victim's request, a test for human immunodeficiency virus (HIV) shall be administered to the defendant/accused not later than forty-eight (48) hours after the date on which the information or indictment is presented, and the defendant/accused shall be subjected to follow-up testing for HIV upon a determination that such follow-up testing is medically necessary and reasonable. The results of any such test shall be confidential but shall be made available to the victim or, if the victim is a child, to the guardian of the victim. After an indictment, if the case is dismissed, the defendant is found not guilty or the case is not prosecuted within three (3) years of the indictment, all records of tests shall be returned to the accused or destroyed. Upon a showing of good cause, the court may retain such records and allow a case to remain open after the expiration of the three-year limitation provided herein.

(2) Any defendant who is convicted of, or pleads guilty or nolo contendere to, any offense or an attempt to commit any such offense specified in subsection (1)(b) shall be ordered by the court to make restitution to the Division of Victim Compensation in an amount equal to the compensation paid by the Division of Victim Compensation to the victim or medical provider for the medical forensic examination and to the county for tests for sexually transmitted diseases. Such restitution shall be in addition to any restitution which the court orders the defendant to pay the victim under the provisions of Chapter 37 of Title 99, (Sections 99-37-1 through 99-37-21), Mississippi Code of 1972.

(3) The Division of Victim Compensation is hereby authorized, in its discretion, to make application for and comply with such requirements as may be necessary to qualify for any federal funds as may be available as a result of services rendered to crime victims under the provisions of this section.

**SOURCES:** Laws, 1987, ch. 466; Laws, 1997, ch. 509, § 1; Laws, 1999, ch. 560, § 1; Laws, 2005, ch. 507, § 1; Laws, 2007, ch. 587, § 1, eff from and after July 1, 2007.

**Amendment Notes** — The 2005 amendment rewrote the section to make the Division of Victim Compensation, rather than the county, responsible for the costs associated with the medical forensic examination and the preparation of the sexual assault evidence collection kit.

The 2007 amendment, in (1)(a), deleted “in this state” and “in the state” following “medical clinic” the first and second time it appears, respectively, inserted “having occurred in this state” both times it appears, and deleted the former sixth sentence, which read: “However, if the victim refuses to cooperate with the investigation or prosecution of the case, the Division of Victim Compensation may seek reimbursement from the victim”; in (1)(b), inserted “or statutory rape as defined in Section 97-3-65,” in the first sentence, added the third sentence, inserted “any” and “confidential but shall be” in the fourth sentence, and added the last two sentences; and rewrote the first sentence of (2).

**Cross References** — District attorneys generally, see §§ 25-31-1 et seq.



Division of victim compensation of the Attorney General's office generally, see §§ 99-41-7, 99-41-9.

Crime Victims' Compensation Fund to pay for sexual assault examinations pursuant to this section, see § 99-41-29.

### RESEARCH REFERENCES

**ALR.** Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

## CHAPTER 38

### Crime Victim's Escrow Account Act

SEC.

- 99-38-1. Short title.
- 99-38-3. Definitions.
- 99-38-5. Obligation to submit contract with respect to reenactment of crime or expression of defendant's thoughts regarding crime, and to pay over funds due under contract, to Treasurer.
- 99-38-7. Deposit of funds into escrow account; registration by crime victims; notice of establishment of escrow account; payments from escrow to victims; notice of filing of claim.
- 99-38-9. Disposition of escrow account; insanity of defendant; payments to defendant; payments to defendant's minor children; payments to Criminal Justice Fund.
- 99-38-11. Offenses and penalties.

#### § 99-38-1. Short title.

This chapter shall be known and may be cited as the "Crime Victims' Escrow Account Act."

**SOURCES:** Laws, 1987, ch. 468, § 1, eff from and after July 1, 1987.

**Cross References** — Victim's right to give victim impact statement for use by court in sentencing criminal defendant, see §§ 99-19-151 through 99-19-161.

Rights of victim in criminal justice system, see § 99-36-5.

Restitution to crime victims, see §§ 99-37-1 et seq.

#### § 99-38-3. Definitions.

As used in this chapter the following terms shall have the meanings herein ascribed:

(a) "Accused" shall mean any person who has been indicted for a criminal offense or against whom a criminal prosecution has been commenced;

(b) "Treasurer" shall mean the State Treasurer of the State of Mississippi; and

(c) "Victim" shall mean any person who suffers damages as a result of another person's criminal activities. The term "victim" shall not include any coparticipant in the criminal activities of an accused or convicted person, or any person knowingly participating in a criminal act at the time he became a victim.

**SOURCES:** Laws, 1987, ch. 468, § 2; Laws, 1992, ch. 422, § 2, eff from and after passage (approved May 4, 1992).

**§ 99-38-5. Obligation to submit contract with respect to reenactment of crime or expression of defendant's thoughts regarding crime, and to pay over funds due under contract, to Treasurer.**

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the legal representative, assignee, beneficiary or heirs at law of any person accused or convicted of a crime in this state, with respect to the reenactment of such crime by way of a movie, book, magazine article, tape recording, phonograph record, photograph, reproduction, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the Treasurer and pay over to the Treasurer any monies which would otherwise, by the terms of such contract, be owing to the person so accused or convicted or his legal representative, assignee, beneficiary or heirs at law.

**SOURCES:** Laws, 1987, ch. 468, § 3, eff from and after July 1, 1987.

**Cross References** — Restitution to crime victims generally, see §§ 99-37-1 et seq. Penalties for failure to comply with the provisions of this chapter, see § 99-38-11.

Disposition of funds received pursuant to this section, see §§ 99-38-7, 99-38-9.

Penalties for failure to comply with provisions of this section, and enforcement by Attorney General, see § 99-38-11.

## **JUDICIAL DECISIONS**

### **0.5. Applicability.**

Defendant's claim of an illegal sentence was not subject to the time bar of three years set forth in Miss. Code Ann. § 99-38-5(2) because errors affecting a fundamental constitutional right were excepted from the time bar; although defendant

was sentenced over eight years ago and her probation was revoked six years ago, the appellate court would address the merits of her claim. *Miller v. State*, 879 So. 2d 1050 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

**§ 99-38-7. Deposit of funds into escrow account; registration by crime victims; notice of establishment of escrow account; payments from escrow to victims; notice of filing of claim.**

(1) The Treasurer shall deposit such monies as he receives under the provisions of Section 99-38-5, within seven (7) days from the receipt thereof, in an interest-bearing escrow account in the name of the person accused or convicted, for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by an accused or convicted person.

(2) Any person, or the legal representative of any person, who is the victim of a crime may register with the Treasurer and request to be notified of the establishment of an escrow account under the provisions of this chapter. Such registration shall include the name and address of the victim and his legal representative if applicable, an identification by name of the person accused or



convicted of an offense against the victim, the location where and the date upon which such offense occurred, and such other information as the Treasurer shall require. The Treasurer shall immediately notify, by United States mail, the victim or the legal representative of any victim who has registered with the Treasurer upon the establishment of an escrow account for the benefit of any such registered victim. In addition, the Treasurer shall, at least once every four (4) months for one (1) year from the date he receives monies under the provisions of Section 99-38-5, cause to have published a legal notice in some newspaper having a general circulation in the county in which the crime was committed and in counties contiguous to such county advising any and all victims that escrow monies are available to satisfy money judgments pursuant to this chapter. All costs and expenses incurred by the Treasurer in giving the notice and making publication required by this subsection shall be paid from funds in the escrow account. Payments may be made pursuant to this chapter to the victim or his legal representative only if the accused person is convicted or enters a plea of guilty of the crime, and provided that the victim or his legal representative, within one (1) year of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his legal representative, assignee, beneficiary or heirs at law. The Treasurer shall disburse payments on a pro rata basis of all claims filed according to the amount of money in the escrow account comparable to the amount of each such claim; provided, however, such sums shall not be disbursed until all pending claims have been settled or reduced to judgment.

(3) It shall be the duty of the victim, the victim's lawyer or the victim's legal representative to notify the Treasurer within thirty (30) days of filing any claim under this chapter.

**SOURCES:** Laws, 1987, ch. 468, § 4, eff from and after July 1, 1987.

**Cross References** — Transfer of monies from escrow account to Criminal Justice Fund where no civil actions are pending under this section, see § 99-38-9.

Penalties for failure to comply with the provisions of this chapter, see § 99-38-11.

**§ 99-38-9. Disposition of escrow account; insanity of defendant; payments to defendant; payments to defendant's minor children; payments to Criminal Justice Fund.**

(1) The Treasurer shall make payments from an escrow account established pursuant to Section 99-38-5 to the accused or convicted person in whose name the account was established upon the order of a court of competent jurisdiction after a showing by such person that such monies shall be used for the exclusive purpose of retaining legal representation at any stage of any criminal proceedings against such person, including the appeals process.

(2) Whenever it is found that a person accused of a crime is unfit to proceed as a result of insanity because such person lacks the capacity to understand the proceedings against him or to assist in his own defense, the

Treasurer shall bring an action of interpleader to determine disposition of the escrow account. For the purposes of this chapter, a person found not guilty by reason of insanity shall be deemed to be a convicted person.

(3) Except as otherwise provided in subsection (4) of this section, upon dismissal of charges or acquittal or subsequent exoneration of any person accused of an offense arising out of the same circumstances which led to the establishment of an escrow account under this chapter, the Treasurer shall immediately pay over to such accused person, his legal representative, assignee, beneficiary or heirs at law the monies in the escrow account established on his or their behalf. Except as otherwise provided in subsection (4) of this section, upon a showing that the accused person has been convicted or has pleaded guilty to an offense for which an escrow account has been established under this chapter and that one (1) year has elapsed from the time of establishment of such escrow account, and that no civil actions are pending under the provisions of subsection (2) of Section 99-38-7, the Treasurer shall immediately transfer all monies in the escrow account established in the name of the accused person, less such costs and expenses as the Treasurer incurs in the administration thereof, to the Criminal Justice Fund created in Section 99-19-32, Mississippi Code of 1972.

(4) Notwithstanding the provisions of subsection (3), upon a showing that one (1) year has elapsed from the time of the establishment of such escrow account and that no civil actions are pending under the provisions of Section 99-38-7(2), and upon a showing that the accused in whose name the account is established is the parent of one or more minor children and that the minor children are in need of financial support, the chancery court of the district in which the minor children reside may order the Treasurer to pay over an amount set by the court for the support of such children until they reach the age of majority. Upon order of the court, the Treasurer shall pay the specified amount to a guardian appointed by the court, for the use and benefit of the minor children. In no event shall the total amount to be paid for the support of any minor children of the accused in whose name the account is established exceed the amount of money in the account at the time the court issues its order.

(5) The Treasurer shall be authorized to promulgate such rules and regulations as shall be necessary to carry out the provisions of this chapter.

**SOURCES:** Laws, 1987, ch. 468, § 5, eff from and after July 1, 1987.

**Cross References** — Deposit of funds received under the provisions of § 99-38-5 into escrow account, see § 99-38-7.

Penalties for failure to comply with the provisions of this chapter, see § 99-38-11.

## **§ 99-38-11. Offenses and penalties.**

(1) It shall be unlawful for any person, firm, corporation, partnership, association or other legal entity to fail to comply with the provisions of this chapter.

(2) Any person, firm, corporation, partnership, association or other legal entity violating the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction of the violation, shall be punished as for a misdemeanor.

(3) Each day any such person, firm, corporation, partnership, association or other legal entity continues in violation of the provisions of this chapter shall constitute a separate offense.

(4) Any action taken by any person accused or convicted of a crime or who enters a plea of guilty of a crime, or by a person or legal entity with whom any such person contracts as set forth in Section 99-38-5, whether by way of execution of a contract or agreement outside of this state, execution of a power of attorney, donation, creation of corporate entities, or otherwise, to defeat the purpose of this chapter shall be null and void as against the public policy of the state.

(5) In addition to such powers and duties of the Attorney General of this state as are otherwise authorized and prescribed by law, the Attorney General shall be authorized to bring a civil action in any court of competent jurisdiction to enforce the obligations of a contracting party to make payment to the Treasurer of such monies as are required to be paid to the Treasurer under the provisions of Section 99-38-5.

**SOURCES:** Laws, 1987, ch. 468, § 6, eff from and after July 1, 1987.



## CHAPTER 39

### Post-Conviction Proceedings

Article 1.	Mississippi Uniform Post-Conviction Collateral Relief Act	99-39-1
Article 3.	Mississippi Capital Post-Conviction Counsel Act .....	99-39-101

#### ARTICLE 1.

##### MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT.

SEC.	
99-39-1.	Short title.
99-39-3.	Purpose.
99-39-5.	Grounds for relief; time limitations.
99-39-7.	Filing motion in trial court; filing motion to proceed in trial court with supreme court.
99-39-9.	Requirements of motion and service.
99-39-11.	Judicial examination of original motion; dismissal; filing answer.
99-39-13.	Answer; affirmative defenses.
99-39-15.	Requests for discovery.
99-39-17.	Expansion of record.
99-39-19.	Evidentiary hearing; summary judgment.
99-39-21.	Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.
99-39-23.	Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof; appointment of postconviction counsel in death penalty cases.
99-39-25.	Right to appeal; stay of judgment; bail on appeal.
99-39-27.	Application to Supreme Court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.
99-39-28.	Supreme Court to establish rules for post-conviction proceedings in capital cases.
99-39-29.	Stay of death penalty execution.

#### § 99-39-1. Short title.

This article shall be known and may be cited as the “Mississippi Uniform Post-Conviction Collateral Relief Act.”

**SOURCES:** Laws, 1984, ch. 378, § 1.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to “this chapter” was changed to “this article.” The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Cross References** — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18

Appealability of circuit court hearing regarding sanity of prisoner under death sentence, see § 99-19-57.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Post-conviction motion properly denied.
3. Post-conviction relief improperly denied.
4. Post-conviction relief properly granted.

### 1. In general.

Appellate court lacked jurisdiction to hear the denial of a motion for post-conviction relief because defendant did not file a notice of appeal within 30 days as required by Miss. R. App. P. 4(a); it declined to suspend the requirement under Miss. R. App. P. 2(c) because defendant did not try to reopen the time for appeal or seek an extension. *Minchew v. State*, — So. 2d —, 2007 Miss. App. LEXIS 260 (Miss. Ct. App. Apr. 24, 2007).

There is no procedure for filing a “notice” of post-conviction relief; therefore, a trial court did not err by treating a “notice” as a motion where the filing clearly stated that it was a motion and that defendant was moving for post-conviction relief. *Adams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. Feb. 6, 2007).

Where a defendant raised ineffective assistance of counsel on direct appeal, and raises it again in a post-conviction proceeding, supported by extraneous materials that were not available on direct appeal, an appellate court’s consideration of the issue is not barred by *res judicata*; where the defendant raises ineffective assistance of counsel at the post-conviction stage, and it is the same issue raised on direct appeal but only rephrased, *res judicata* will apply. *Hodges v. State*, 949 So. 2d 706 (Miss. 2006).

Defendant was entitled to an evidentiary hearing on his petition for post-conviction relief on the voluntariness of his guilty plea because the prosecutor’s letter clearly indicated that erroneous advice was given which implicated the voluntariness of defendant’s plea; the discrepancy between the reality of

defendant’s sentence and the advice given by the prosecutor was apparent. *Haynes v. State*, 944 So. 2d 121 (Miss. Ct. App. 2006).

On the inmate’s petition for post-conviction relief, the court held that the inmate was not prejudiced by counsel’s failure to transcribe the full record because the inmate did not claim any specific error arising from the non-transcribed sections of the record. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

On the inmate’s petition for post-conviction relief, the court held that counsel was not ineffective for failing to present mitigating evidence at sentencing because it was the inmate’s choice not to do so; the inmate was fully apprised of the consequences of his choice and he made an informed and voluntary decision not to present mitigating evidence. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

On the inmate’s petition for post-conviction relief, the court held that defense counsel’s decision not to seek a change of venue based on pretrial publicity was beyond its review. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

Post-conviction relief petition was not dismissed based on the state’s allegation that the writ was successive because the issue was not raised before the trial court or in an appellate brief. *Knight v. State*, 956 So. 2d 264 (Miss. Ct. App. 2006).

Defendant’s application for relief was styled “Petition of Writ for Habeas Corpus,” but the circuit court was correct in construing his application for relief as a post-conviction relief claim as his request for relief, in essence, was simply a challenge to the validity of his life sentence. Therefore, his request for relief was a motion for post-conviction relief; moreover, purely collateral post-conviction remedies attacking a judgment of conviction or sentence were to be sought under authority of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code Ann. §§ 99-39-1 through 99-39-29. *Trotter v. State*, 907 So.

2d 397 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Appeal filed by the petitioner challenging the circuit court's order denying his request for free copies of the records and transcripts of his guilty plea, was dismissed for lack of jurisdiction because the petitioner's only means of appellate review was to follow the procedures set forth in the Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29, since he entered a guilty plea, and the petitioner had not followed the Act's procedures; nothing in the Uniform Post-Conviction Collateral Relief Act or elsewhere gave the petitioner the right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court's ruling, to directly appeal that ruling to the appellate court as a separate and independent action. *Shanks v. State*, 906 So. 2d 760 (Miss. Ct. App. 2004).

No defendant may be granted a hearing on the issue of Eighth Amendment protection from execution due to alleged mental retardation unless, prior to the expiration of the deadline set by the trial court for filing motions, the defendant shall have filed with the trial court a motion seeking such a hearing, and the defendant must attach to the motion an affidavit from at least one expert who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient ("IQ") of 75 or below, and (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded; the court further holds that, for defendants whose trials were held prior to publication of this opinion, the affidavit as described above shall be attached to the defendant's application for post-conviction relief, and such application shall then be considered pursuant to the provisions of Miss. Code Ann. §§ 99-39-1 et seq. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

Inmate's request for leave to file an application seeking post-conviction relief was denied because the inmate was unable to show that the imposition of the death penalty was the result of ineffective assistance of counsel since defense counsel objected to the testimony of a patholo-

gist, the admission of certain photographs, and a confession; moreover, the inmate failed to show how the introduction of medical records would have persuaded the jury to exercise leniency, and the inmate failed to show how a government-funded expert would have disputed the finding of the State's expert. *Holland v. State*, 878 So. 2d 1 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1590, 161 L. Ed. 2d 280 (2005).

Inmate's request for leave to file an application seeking post-conviction relief was denied because the State was not required to give notice of the aggravating factors in a death penalty case by listing them in an indictment; moreover, the Mississippi Supreme Court rejected the retroactive application of another decision dealing with such because there was no express pronouncement of its retroactivity. *Holland v. State*, 878 So. 2d 1 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1590, 161 L. Ed. 2d 280 (2005).

Appellate court affirmed the trial court's denial of post-conviction relief, but the record sent up with the appeal indicated that defendant might have been twice convicted and sentenced for the same crime; therefore, the trial court inadvertently failed to enter an order granting the motion for a new trial and setting aside defendant's earlier conviction and sentence. *Haley v. State*, 864 So. 2d 1022 (Miss. Ct. App. 2004).

Mississippi Post-Conviction Collateral Relief Act does not suspend the writ of habeas corpus in violation of Miss. Const. Art. III, § 21, as the act is merely a codification of existing constraints on review traditionally practiced by the Mississippi Supreme Court. *Putnam v. State*, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court properly denied defendant's petitions for post-conviction relief, Miss. Code Ann. §§ 99-39-1 et seq., because defendant was adequately informed of the possible consequences of pleading guilty, and defendant did not receive ineffective assistance of counsel. *Rodolfich v. State*, 858 So. 2d 221 (Miss. Ct. App. 2003).

Inmate's petition for post-conviction relief was properly denied because nothing in the record indicated that the inmate's



plea to manslaughter was not knowing or voluntary. *Hollingsworth v. State*, 852 So. 2d 612 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Petition for post-conviction relief based on ineffective assistance of counsel was properly denied because an inmate failed to show that allegedly discoverable evidence would have been exculpatory in light of a co-defendant's statement that implicated the inmate in a murder. *Hollingsworth v. State*, 852 So. 2d 612 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant was fully informed of the nature of the charge against him, the rights he would waive by pleading guilty, and the maximum sentence he could receive, and he expressed full satisfaction with his attorney, denying that he had been coerced into pleading guilty; thus, defendant entered his plea voluntarily, knowingly, and intelligently and his motion for post-conviction relief was properly denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, the record lacked any evidence that defendant presented himself as anything but mentally competent and there was no evidence to indicate that defendant's attorney was on notice of any psychiatric problem or that defendant's mind was or could be impaired; thus, there was no basis for defendant's attorney to request a mental evaluation for defendant, and defendant's motion for post-conviction relief was properly denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

Appellate court initially noted defendant did not argue that her guilty pleas were involuntary or that she relied on mistaken advice from her attorney regarding parole eligibility, earned or meritorious time; defendant simply asserted that she was unaware of her ineligibility for parole, earned time, and meritorious time, and as such, defendant was procedurally barred from discussing the issue for the first time on appeal. *Stewart v.*

*State*, 845 So. 2d 744 (Miss. Ct. App. 2003).

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45 and entered a plea of guilty to the escape, and the sentence of three years was well within the maximum prescribed by the statute, which referred to prisoners sentenced to the Mississippi Department of Corrections and allowed a maximum sentence of five years, and thus the inmate was not entitled to post-conviction relief; although the inmate was in custody and on a work program for a county at the time of the escape, the inmate was considered under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence required imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. *Gardner v. State*, 848 So. 2d 900 (Miss. Ct. App. 2003).

Inmate's motion for post-conviction relief after a guilty plea to possession of cocaine was properly denied because the inmate was unable to show that the plea was involuntary, that counsel was ineffective; or that the sentence imposed was excessive. *Gunter v. State*, 841 So. 2d 195 (Miss. Ct. App. 2003).

Circuit court's failure at sentencing hearing to elicit responses from defendant regarding his desire to appeal his case, his understanding of time frame in which he could make appeal and his financial ability to pursue appeal did not entitle defendant to out-of-time appeal, where defense counsel obtained signed witness statement indicating that defendant did not wish to appeal immediately following sentencing hearing, and circuit court conducted full-scale evidentiary hearing as to

whether to allow out-of-time appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

While it is preferable for circuit court to make some inquiries as to whether defendant understands the rights of which he has been advised at sentencing hearing, where there has been full-scale evidentiary hearing as to whether out-of-time appeal should be allowed, fact that trial judge merely advised defendant of his or her right to appeal does not, in and of itself, warrant grant of out-of-time appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Defendant's case had achieved finality before *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, was rendered, so prosecution's use of peremptory challenges to strike blacks need not be reviewed under dictates of *Batson*. Relief sought under Mississippi Uniform Post-Conviction Collateral Relief Act is not direct appeal, but is instead collateral review. *Caldwell v. State*, 517 So. 2d 1360 (Miss. 1987).

The Mississippi Uniform Post-Conviction Collateral Relief Act is largely a codification of existing law. *Dufour v. State*, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

## **2. Post-conviction motion properly denied.**

Inmate was not entitled to post-conviction relief on the ground that the indictment was defective because the indictment charged the inmate with knowingly and intentionally selling cocaine in violation of Miss. Code Ann. § 41-29-139, which was sufficient to notify the inmate that the inmate was charged with the crime of knowingly and intentionally selling a Schedule II controlled substance under § 41-29-139(a)(1) and that the inmate could be sentenced under § 41-29-139(b)(1). *Stepp v. State*, — So. 2d —, 2007 Miss. App. LEXIS 368 (Miss. Ct. App. May 29, 2007).

Motion for post-conviction relief was summarily dismissed since defendant, who was 65 years old and had no prior record, was unable to show that his sentences for burglary and aggravated as-

sault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7 were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. *Denton v. State*, 955 So. 2d 398 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine under Miss. Code Ann. § 41-29-139(a) since his 20-year sentence was not illegal; because he was a habitual offender, defendant should have actually received a mandatory 30-year sentence. *Rucker v. State*, 955 So. 2d 958 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he failed to request a bifurcated hearing on his habitual offender status; even if the error had been preserved, a hearing was not required because he entered a guilty plea to the principal charge. *Rucker v. State*, 955 So. 2d 958 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he was unable to show that counsel acted deficiently in the context of a plea when defendant received the exact sentence that he bargained for. *Rucker v. State*, 955 So. 2d 958 (Miss. Ct. App. 2007).

Where appellant pled guilty to manslaughter and armed robbery, counsel filed a motion for postconviction relief alleging that the indictment was defective; the trial court denied the motion, finding that appellant waived the objection to the indictment by pleading guilty, and appellant's successive motions for postconviction relief were properly denied. *Runnels v. State*, 957 So. 2d 424 (Miss. Ct. App. 2007).

Where only one mention was made of defendant's prior mental illness, a trial court did not err by failing to provide a competency hearing during sentencing since one was not required; defendant stated he was able to understand his plea given during sentencing, defendant's attorney stated that defendant was able to



proceed, and the trial court had an opportunity to observe defendant during a two-day trial. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly denied in a case where defendant contended that a plea was involuntarily given due to diminished mental capacity; defendant stated that he understood the charges against him and the consequences of a plea under Miss. Unif. Cir. & Cty. R. 8.04(A)(4)(b), and moreover defense counsel stated that it was his opinion that defendant was able to enter into the plea. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

Where the trial court denied appellant's first motion for postconviction relief from judgments convicting him on pleas of guilty to manslaughter and armed robbery, appellant was not entitled to relief under Miss. R. Civ. P. 60(b) based on a claim that he did not authorize counsel to file the motion and he should be able to submit a pro se motion for post-conviction relief; appellant was denied relief under Rule 60(b), because he showed no exceptional circumstances. *Runnels v. State*, 957 So. 2d 424 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied based on an allegation of ineffective assistance of counsel under the Sixth Amendment because defense counsel did not act deficiently in failing to request a competency hearing where there was no evidence that one was warranted during trial, a plea hearing, or at sentencing. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied based on an amended indictment in an aggravated assault case because the failure to include the phrase "thereby manifesting extreme indifference to the value of human life" was not erroneous since this was not an element of the crime; moreover, all of the requirements for indictments under Miss. Unif. Cir. & Cty. R. 7.06 were met. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

Where appellant pled guilty to the manufacture of methamphetamine, he was sentenced to 22 years as permitted by Miss. Code Ann. § 41-29-139(b)(1); the post-conviction court found that the sen-

tence was not disproportionate to the crime and correctly dismissed his petition without a hearing. *Sellars v. State*, — So. 2d —, 2007 Miss. App. LEXIS 254 (Miss. Ct. App. Apr. 24, 2007).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. §§ 47-7-34 and 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. *Davis v. State*, 954 So. 2d 530 (Miss. Ct. App. 2007).

Where appellant claimed that appellant suffered from untreated mental disorders, the post-conviction court found that appellant's plea of guilty to two counts of aggravated assault was voluntary and intelligent; the trial judge determined that appellant was competent to enter a guilty plea, and appellant told the trial court several times that appellant wished to plead guilty. *Cross v. State*, 954 So. 2d 497 (Miss. Ct. App. 2007).

Denial of defendant's petition for post-conviction relief was affirmed where his plea was entered into voluntarily as he was informed of the charge, the effect of the plea, the rights he would waive, and possible sentence; under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3), there was a factual basis to accept plea and defendant failed to support his ineffective assistance of counsel claims and was not deprived of speedy trial. *Turner v. State*, — So. 2d —, 2007 Miss. App. LEXIS 200 (Miss. Ct. App. Apr. 3, 2007).

Post-conviction relief was denied where there was a factual basis for a plea to sexual battery under Miss. Code Ann. § 97-3-95(1)(a), (d); defendant confessed to police that he penetrated a 13-year-old when he was 25, the victim stated that she was the victim of forcible intercourse, and the medical evidence showed that she had been vaginally penetrated. *Parkman v. State*, 953 So. 2d 315 (Miss. Ct. App. 2007).

Where a guilty plea was entered in a sexual battery case, there was no way to



later challenge based on an allegation that a confession was involuntary since the right to do so was waived by the entry of the plea; therefore, post-conviction relief was properly denied on this ground. *Parkman v. State*, 953 So. 2d 315 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where a guilty plea was entered to the charge of sexual battery because there was no ineffective assistance of counsel; defendant indicated at his plea hearing that he was satisfied with the attorney's investigation of the case, the attorney was not deficient in advising defendant that he would probably not prevail at trial due to the confession, defendant never told the attorney that there was anything wrong with the confession, and the attorney was not deficient for failing to file an appeal since this right was waived by the guilty plea. *Parkman v. State*, 953 So. 2d 315 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. *Pruitt v. State*, 953 So. 2d 302 (Miss. Ct. App. 2007).

Post-conviction relief was summarily denied in a case where defendant entered a guilty plea to the sale of cocaine under Miss. Code Ann. § 41-29-139 because the record and his sworn statements at the plea colloquy contradicted his later claim that the plea was not entered knowingly, voluntarily, and intelligently. *Belton v. State*, — So. 2d —, 2007 Miss. App. LEXIS 179 (Miss. Ct. App. Mar. 27, 2007).

In a case where defendant entered a guilty plea to the sale of cocaine, post-conviction relief was properly denied because an indictment was not ineffective based on a failure to include the amount of drugs sold; this was not an essential element of the crime. *Belton v. State*, — So. 2d —, 2007 Miss. App. LEXIS 179 (Miss. Ct. App. Mar. 27, 2007).

In a case where defendant pled guilty to the sale of cocaine, post-conviction relief

was denied because he did not show that he received ineffective assistance of counsel, as defense counsel properly informed defendant that he could have received the death penalty if he did not take the plea offer; moreover, even if defendant showed that the first prong of the ineffective assistance of counsel test was met, he did not allege that any imagined deficiency caused him prejudice. *Belton v. State*, — So. 2d —, 2007 Miss. App. LEXIS 179 (Miss. Ct. App. Mar. 27, 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the crime of the sale of cocaine because an indictment was not void due to the fact that it was returned during a July term, but filed during a November term, since this was not prohibited under Miss. Code Ann. § 13-5-39; the grand jury continued to serve from term to term until the next grand jury was impaneled, and it was allowed to return indictments at any term of court. *Belton v. State*, — So. 2d —, 2007 Miss. App. LEXIS 179 (Miss. Ct. App. Mar. 27, 2007).

Where a hunting cabin was fully furnished and had food items, cooking supplies, appliances, and other living comforts and necessities, it constituted a dwelling under Miss. Code Ann. § 97-17-23; therefore, post-conviction relief was denied because defendant was properly charged with burglary of a dwelling, and no evidence was presented by the owners of such due to the fact that defendant entered a guilty plea. *Young v. State*, 952 So. 2d 1031 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant entered a guilty plea to the charge of burglary of a dwelling because there was no ineffective assistance of counsel shown; defendant stated that he was not forced to give the plea, he indicated that he was satisfied with counsel's performance, and there was nothing to show that defendant was surprised by the plea proceedings, despite having a short amount of time to make a decision regarding the plea offer. *Young v. State*, 952 So. 2d 1031 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on a venue challenge because at least part of the offense of statutory rape occurred in

a county where defendant picked his victim up before having intercourse in another county, pursuant to Miss. Code Ann. § 99-11-19; moreover, defendant chose to enter a plea after being informed of a discrepancy. *Plummer v. State*, — So. 2d —, 2007 Miss. App. LEXIS 166 (Miss. Ct. App. Mar. 20, 2007).

Defendant's motion for post-conviction relief was properly denied because his plea was voluntarily and intelligently given in a grand larceny case where the trial court asked him several questions regarding his understanding of the plea, its consequences, and the charges; moreover, there was no reason to consult his mother first where defendant was represented by an attorney, and he was 24 years old with an 11th grade education. *Adams v. State*, 950 So. 2d 259 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied because he did not receive ineffective assistance of counsel during a guilty plea; there was no duty to investigate for defects in a proper indictment where no error was found in the fact that the instrument bore a grand jury date preceding the indictment's filing date, defendant did not give an adequate argument regarding which rights the attorney failed to advise him of, and it was merely trial strategy to fail to object to a statement from the victim's family at sentencing. *Adams v. State*, 950 So. 2d 259 (Miss. Ct. App. 2007).

Post-conviction relief was denied because defendant was unable to show that she received ineffective assistance of counsel in entering a guilty plea; an allegation that the attorney did not explain the charges or possible sentences adequately contradicted the sworn statements defendant gave during a guilty plea. *Jones v. State*, 948 So. 2d 499 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant contended that a plea was not voluntary because this claim was contradicted by her statements at the plea hearing, and defendant acknowledged that she was waiving certain rights; moreover, she stated that she had been informed of the minimum and maximum sentences applicable to her case, pursuant

to Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b). *Jones v. State*, 948 So. 2d 499 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on a claim that a circuit court lacked jurisdiction over a guilty plea based on the alleged price of stolen items in a larceny case because the circuit court had original jurisdiction over all matters civil and criminal; moreover, defendant was unable to litigate her actual guilt on appeal from a denial of post-conviction relief. *Jones v. State*, 948 So. 2d 499 (Miss. Ct. App. 2007).

Because defendants entered voluntary and intelligent guilty pleas to armed robbery, they waived the right to challenge the voluntariness of their confessions to such under the U.S. Constitution and Miss. Const. Art. 3, §§ 14 and 26; therefore, their motions for post-conviction relief were denied. *Holland v. State*, 956 So. 2d 322 (Miss. Ct. App. 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate because he failed to show that his attorneys were ineffective in part for requesting that venue be transferred; any prejudice claimed by the inmate was purely hypothetical and was insufficient to demonstrate any ineffectiveness. *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

Defendant was not entitled to post-conviction relief based on ineffective assistance when res judicata barred some of the claims such as counsel's failure to support a motion to suppress defendant's confession, counsel's failure to properly advise on plea bargains, counsel's failure to introduce victims' impact statement, and failure to properly prepare defendant to give his testimony. *Hodges v. State*, 949 So. 2d 706 (Miss. 2006).

Appellate court affirmed the denial of the inmate's motion for post-conviction relief as the inmate acknowledged that recommended post-release supervision would be five years, and Miss. Code Ann. § 47-7-34 authorized post-release supervision of up to five years. *Elliott v. State*, 924 So. 2d 609 (Miss. Ct. App. 2006).

Court denied defendant's petition for post-conviction relief after defendant was convicted of capital murder and sentenced



to death when *res judicata* under Miss. Code Ann. § 99-39-21(3) barred the claims about prosecutorial misconduct, evidentiary rulings like the admission of prior bad acts, jury instructions, and ineffective counsel that were raised in defendant's direct appeal. *Hodges v. State*, 949 So. 2d 706 (Miss. 2006).

Trial court properly dismissed defendant's motion for post-conviction relief where he was not subjected to double jeopardy by being convicted of three criminal offenses arising out of a single incident; a criminal defendant could be convicted of more than one offense that arose out of a single event where each offense required proof of a different element. *Ward v. State*, 944 So. 2d 908 (Miss. Ct. App. 2006).

Defendant's motion for post-conviction relief was properly denied where he failed to provide sufficient evidence demonstrating his attorney's deficiency; defendant admitted in his brief that he could not name the witness that counsel should have interviewed, nor did he disclose the "mitigating information" that counsel allegedly failed to uncover. *Jones v. State*, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant did not show ineffective assistance of counsel where defendant failed to point out anything counsel could have done other than proceed to trial on a theory that a witness may have committed the crimes because he turned in some of the items taken in the robbery; indigent defendants were not entitled to appointed counsel of their choice. *Anderson v. State*, 943 So. 2d 102 (Miss. Ct. App. 2006).

Appellant convicted of possession of cocaine with intent to deliver and sentenced to 30 years as a habitual offender without parole was not entitled to post-conviction relief; his sentence was not illegal, he was not denied counsel at a revocation hearing, and his ineffective assistance of counsel claim from 1983 was time-barred by Miss. Code Ann. § 99-39-5(2). *Sanders v. State*, 942 So. 2d 298 (Miss. Ct. App. 2006).

Appellant sentenced to 30 years in custody upon his plea of guilty to the sale of cocaine was not entitled to post-conviction relief, and there was a factual basis to support the plea and the sentence was

within the appropriate range; the sentencing judge was permitted to consider a letter from the sheriff explaining defendant's escape on new criminal charges and the police chase that caused personal injuries and damages. *Vaughn v. State*, 942 So. 2d 291 (Miss. Ct. App. 2006).

Indictment charging appellant with selling of cocaine was not required to allege the weight of the controlled substance, because it was not an element of the crime defined in Miss. Code Ann. § 41-29-139(a)(1); there was no merit to appellant's claim that counsel was ineffective because of flaws in the indictment, and he was not entitled to post-conviction relief. *Hammond v. State*, 938 So. 2d 375 (Miss. Ct. App. 2006).

Dismissal of an inmate's motion for post-conviction relief was affirmed as the trial judge's allocution with the inmate was sufficient to show that the inmate's plea was voluntary, and the inmate failed to establish that he was deprived of effective assistance of counsel. *Brown v. State*, 935 So. 2d 1122 (Miss. Ct. App. 2006).

Appellate court denied an inmate's motion for post-conviction relief because the inmate acknowledged at his plea hearing that his attorney was fully informed as to all of the facts and circumstances surrounding his case and that he was informed under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b) of the charge against him, the possible sentence and fine that could be imposed, and the rights he gave up by pleading guilty. *Hill v. State*, 935 So. 2d 416 (Miss. Ct. App. 2006).

Where defendant entered a plea of guilty to murder as a habitual offender in 1980, he was sentenced to serve a term of life in custody. The court treated his 2004 motion to vacate judgment and sentence as a motion for post-conviction relief, and dismissed it as time-barred. *Padgett v. State*, 938 So. 2d 876 (Miss. Ct. App. 2006).

Denial of post-conviction relief was affirmed because the petitioner's guilty plea was voluntarily and knowingly made, and the petitioner failed to establish ineffective assistance of counsel, as it was because of counsel's successful negotiations that the petitioner was able to initially



receive a lenient sentence and eventually able to escape a possible life sentence. *White v. State*, 921 So. 2d 402 (Miss. Ct. App. 2006).

Appellate court held that it would not suspend the requirements of the Mississippi Rules of Appellate Procedure, as defendant failed to show any cause, much less good cause, as to the reason for his 10-year delay in seeking a direct appeal, and the trial court judge committed no error in denying defendant's motion for out-of-time appeal, as the judge had no discretion to allow an out-of-time appeal outside of 180 days from the entry of judgment; thus, the appellate court concluded that it did not find that justice demanded granting defendant an out-of-time appeal 10 years after his conviction. *Parker v. State*, 921 So. 2d 397 (Miss. Ct. App. 2006).

Trial court did not err by denying defendant post-conviction relief where although the victim recanted her trial testimony, on two occasions, that led to defendant's statutory rape conviction under Miss. Code Ann. § 97-3-65(1)(a), the trial court was able to assess her credibility firsthand and find that she had in fact had sex with defendant. *Farrish v. State*, 920 So. 2d 1066 (Miss. Ct. App. 2006).

Defendant's petition for post-conviction relief was denied where defendant's plea was entered voluntarily and intelligently; he expressly acknowledged his understanding of the Alford plea and its consequences while under oath; defendant answered affirmatively as to whether he understood charges against him, did not deny any charges as they were read, and he did not prove that counsel was ineffective. *Cole v. State*, 918 So. 2d 890 (Miss. Ct. App. 2006), cert. dismissed, 927 So. 2d 750 (Miss. 2006).

Defendant was properly denied post-conviction relief after he pled guilty to armed robbery because the trial court did not err in not disqualifying the assistant district attorney on the ground that he had served as defendant's court-appointed attorney prior to serving as assistant district attorney. Confidential information was not used in the prosecution of the case, and defendant was not denied fair trial. *Vandergriff v. State*, 920 So. 2d 486 (Miss. Ct. App. 2006).

Petitioner was properly denied post-conviction relief after he pled guilty to manslaughter by culpable negligence because the maximum sentence for the crime under Miss. Code Ann. § 63-11-30(4) was 25 years, and petitioner was only sentenced to 20 years in prison, with 14 years suspended. Petitioner failed to show good cause or prejudice. *Oaks v. State*, 912 So. 2d 1075 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction was proper under the Mississippi Uniform Post-Conviction Collateral Relief Act (PCR), Miss. Code Ann. §§ 99-39-1 et seq. because the holding that testimony pertaining to a witness's offer to take a polygraph was inadmissible at trial did not have retroactive application in the inmate's case. *Manning v. State*, — So. 2d —, 2005 Miss. LEXIS 464 (Miss. Aug. 4, 2005).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery; the court modified the simple robbery petition to charge him with armed robbery and defendant made no objection to the change. Defendant was afforded the effective assistance of counsel and his plea was not involuntary; he was not entitled to post-conviction collateral relief. *Baldwin v. State*, 923 So. 2d 218 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750 (Miss. 2006).

Where the same judge presided over appellant's first and second motion for post-conviction relief, appellant's claim that the judge should have recused himself was not raised below, and therefore could not be raised in the post-conviction appeal. Appellant was not entitled to relief. *Hudson v. State*, 932 So. 2d 842 (Miss. Ct. App. 2005).

Upon resentencing appellant for armed robbery, the trial court increased his sentence from fifteen years to twenty-two years; he was not entitled to post-conviction relief because there was no evidence of vindictiveness. *Hudson v. State*, 932 So. 2d 842 (Miss. Ct. App. 2005).

Defendant's motion for post-conviction relief was properly denied where defendant's guilty plea was valid and without error, and the trial judge's denial of coun-

sel's motion for a continuance was proper, defendant was aware of the minimum and maximum allowable sentence, and defense counsel did not provide inadequate representation at resentencing. *Greer v. State*, 920 So. 2d 1039 (Miss. Ct. App. 2005), cert. dismissed, 933 So. 2d 303 (Miss. 2006).

Denial of an inmate's motion for post-conviction relief was affirmed; the inmate's arrest during house detention after an officer found money, scales, and residue of marijuana, did not violate Miss. Code Ann. § 47-5-1003 simply because the officer who found the drugs waited for a narcotics agent to arrive to conduct the arrest. *Johnson v. State*, 909 So. 2d 122 (Miss. Ct. App. 2005).

Per Miss. Code Ann. § 47-7-37, the circuit court had the statutory authority to revoke defendant's post-release supervision when he sold cocaine to an agent while on release. There was no error where the circuit court reinstated his five-year suspended sentence; further, per the bench warrant upon which defendant was arrested, and the summons setting the revocation hearing, hand delivered to defendant, he had notice of the revocation hearing and he was not denied due process or entitled to post-conviction relief. *Rucker v. State*, 909 So. 2d 137 (Miss. Ct. App. 2005).

Denial of defendant's petition for post-conviction relief was proper where, by pleading guilty, he waived his search and seizure claim, and defendant failed to show that he did not make a knowingly and intelligent plea; defendant noted at his plea hearing that he felt satisfied with his attorney; thus, there was no ineffective assistance of counsel. *Pevey v. State*, 914 So. 2d 1287 (Miss. Ct. App. 2005).

Defendant's motion for post-conviction relief was properly denied where the trial court did not revoke defendant's probation because, after defendant completed the Regimented Inmate Discipline program, he still had to be on supervised probation for the remainder of his original sentence and, because he was still on probation, the court could revoke it based on the violations presented. *Bobo v. State*, 914 So. 2d 767 (Miss. Ct. App. 2005).

Defendant was properly denied post-conviction relief because his counsel was

not ineffective for allowing him to receive an illegal sentence for possession of cocaine where the sentence was corrected six months later and defendant suffered no prejudice. Defendant presented no evidence to show that counsel's objection to the imposed sentence would have changed the outcome. *Black v. State*, 919 So. 2d 1017 (Miss. Ct. App. 2005).

Trial court did not err by denying defendant's petition for post-conviction relief where she failed to cite appropriate legal authority in support of her issues, thereby procedurally barring the claims, and where there was no requirement that she receive a sentence proportionate to a sentence imposed on an accomplice. *Young v. State*, 919 So. 2d 1047 (Miss. Ct. App. 2005).

Where petitioner waived his right to a probation revocation hearing, the court had the right to re-impose petitioner's suspended sentence for uttering forgery because he had tested positive for marijuana and was terminated from a work program. While petitioner claimed that he did not understand that he would have to serve the remaining balance of his sentence, he was not entitled to post-conviction relief. *Gates v. State*, 919 So. 2d 170 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper because, since no evidence accompanied the inmate's motion to contradict the trial court's findings when the guilty plea was entered, he was not entitled to an evidentiary hearing under the Uniform Post-Conviction Collateral Relief Act, Miss. Code Annotated §§ 99-39-1 through 99-39-29. *Hardiman v. State*, 904 So. 2d 1225 (Miss. Ct. App. 2005).

Defendant's two concurrent nine-year sentences and five years of post-release supervision were within the two combined statutory maximum sentences for aggravated assault and shooting into an occupied dwelling adding up to a 30-year maximum sentence; accordingly, the trial court did not commit manifest error in denying his motion for post-conviction relief. *Richardson v. State*, 907 So. 2d 404 (Miss. Ct. App. 2005).

In his post-conviction action, the record showed that at the plea hearing, defen-



dant specifically announced that he was satisfied with the performance of his counsel. Therefore, it could not be stated that his attorney's performance was deficient, or that he was deprived of a fair trial; further, it was clear from that record that defendant knew the trial court was rejecting his original plea agreement, that he then entered his plea knowingly and voluntarily, and as such, he was not entitled to an evidentiary hearing. *Reed v. State*, 918 So. 2d 776 (Miss. Ct. App. 2005).

In his post-conviction action, petitioner was procedurally barred from attacking the undercover officer's out-of-court identification as insufficient to have proven his identity in the drug sale, because he never made an objection to same at the probation revocation hearing. Further, the record was clear that throughout her testimony, the undercover officer repeatedly made reference to "petitioner" as the individual from whom she purchased the drugs, and as petitioner had directed no questions towards the agent, her testimony remained unimpeached and the State met its burden of proving that petitioner "more likely than not" violated the terms of his probation. *Metcalf v. State*, 904 So. 2d 1222 (Miss. Ct. App. 2004).

Plea agreement signed by defendant expressly addressed each of defendant's constitutional rights and it specifically addressed his right against self-incrimination. Defendant was asked in the plea agreement whether he understood that if he pled guilty, he would be waiving his constitutional right against self-incrimination and he answered, "yes"; although the better practice would have been for the trial judge to address defendant's right against self-incrimination specifically, failure to do so was not reversible error, and defendant's application for post-conviction relief was properly denied. *Moore v. State*, 906 So. 2d 793 (Miss. Ct. App. 2004).

Where defendant admitted that he committed statutory rape and entered a plea of guilty to the offense, the court properly denied his motion for post-conviction relief. The record indicated that reasonable steps were undertaken to insure that defendant's plea was voluntary; and he failed to prove that he received the inef-

fective assistance of counsel during the plea proceedings. *Carpenter v. State*, 899 So. 2d 916 (Miss. Ct. App. 2005), cert. denied, 898 So. 2d 679 (Miss. 2005).

Defendant claimed his sentence was illegal because the trial court was without authority, under Miss. Code Ann. § 47-7-3, to suspend any portion of sentence. However, one could not stand mute when receiving a favorable suspended sentence and later use same as a sword, he suffered no actual harm and he was not entitled to post-conviction relief. Further, it could not be said that plea counsel's brief moment of confusion, regarding which charges the State would pursue, rose to the level of ineffective assistance of counsel and the record clearly indicated that the trial judge explained to defendant the terms of the plea agreement. *Sykes v. State*, 895 So. 2d 191 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper pursuant to the Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 et seq., where his due process rights were not violated because there was no need to accommodate the inmate in putting forth witnesses or evidence at a hearing prior to his revocation. *Thomas v. State*, 910 So. 2d 1147 (Miss. Ct. App. 2005).

Defendant asserted that under Miss. Code Ann. § 47-7-33 a priorly convicted felon could not be given a suspended sentence. However, that information did not appear in the indictment or the record, and in fact, he received a very favorable sentence considering the sentencing options available for his offense of the sale of cocaine; thus, where he stood mute at sentencing, he could not later claim prejudice or that plea counsel was ineffective and his petition for post-conviction relief was properly denied. *Ruff v. State*, 910 So. 2d 1160 (Miss. Ct. App. 2005).

Inmate seeking post-conviction relief was not eligible to have his sentences run concurrently, because he committed the second offense while on probation. *Johnson v. State*, 909 So. 2d 1149 (Miss. Ct. App. 2005).

Denial of post-conviction relief was affirmed because the circuit court acted within its authority when it corrected its sentencing order by striking out the lan-



guage that ordered the state sentence to be served concurrently with the federal sentence, as the record showed the sentencing order was amended before the end of the circuit court term. *Toney v. State*, 906 So. 2d 28 (Miss. Ct. App. 2004).

The Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 et seq. does not give a prisoner the right to initiate or proceed with an independent, original action for free documents where he is not pleased with the trial judge's ruling. *Kemp v. State*, 904 So. 2d 1137 (Miss. Ct. App. 2004).

Trial court properly denied an inmate's petition for post-conviction relief alleging that his name was incorrect on the indictment. The name in the indictment had been corrected at the time of the plea. *Neal v. State*, 879 So. 2d 1111 (Miss. Ct. App. 2004).

Record contained a transcript of a guilty plea hearing in which the judge sentenced the inmate to two years' imprisonment for the sale of cocaine; however, also included in the record was a sworn affidavit from the court reporter stating that she had made errors in the original transcript and therefore later made a corrected copy, which showed that the judge had sentenced the inmate to serve 10 years, not two. Because the court reporter's transcript was subject to correction and no order of the trial court ever gave the inmate a two-year sentence, his sentence of 10 years' imprisonment was correct; thus, his motion for post-conviction relief was properly denied. *Collins v. State*, 879 So. 2d 1112 (Miss. Ct. App. 2004).

Inmate's voluntary act of pleading guilty to the crime of manslaughter foreclosed an appellate court from considering issues relating to the voluntariness of a confession or the right to a speedy trial in a motion seeking post-conviction relief. *Young v. State*, 877 So. 2d 552 (Miss. Ct. App. 2004).

Defendant's petition for post-conviction relief was properly denied where defendant consciously and knowingly entered a plea of guilty to the charge of transfer of cocaine; had he not pled guilty, the case would have proceeded to trial because the indictment was never quashed, and based on the totality of the record, there existed

a factual basis for the guilty plea. *Boddie v. State*, 875 So. 2d 180 (Miss. 2004).

Denial of post-conviction relief was affirmed because the inmate's sentence for transfer of cocaine was within the maximum sentence, and considering the totality of the circumstances, counsel's performance was neither deficient nor prejudicial. *Falconer v. State*, 873 So. 2d 163 (Miss. Ct. App. 2004).

Trial court properly denied defendant's motion for post-conviction relief which targeted the effectiveness of counsel and narrowly discussed the voluntariness of defendant's plea as being without merit; although defendant complained about the lack of pretrial investigation, he failed to tell the trial judge or the appellate court which facts in mitigation a further investigation would have revealed, so that defendant did not demonstrate prejudice, having not alleged anything that would have led to a different result. *Hebert v. State*, 864 So. 2d 1041 (Miss. Ct. App. 2004).

Inmate's petition for post-conviction relief based on the alleged involuntariness of a plea was properly denied because the inmate was unable to establish that threats and coercion were used by defense counsel and law enforcement; moreover, the inmate had given sworn testimony to the contrary at the plea hearing. *Steen v. State*, 868 So. 2d 1038 (Miss. Ct. App. 2004).

Defendant's post-conviction motion was properly denied as his plea to armed robbery was knowing and voluntary even though he did not initially admit that he had been armed; defendant was given a thorough explanation of the elements and State's recitation of proof, after which he entered his plea. *Hamlin v. State*, 853 So. 2d 841 (Miss. Ct. App. 2003).

Denial of defendant's motion for post-conviction relief was proper and defendant's claim that his attorney was ineffective in that he lied to the trial court, attempted to induce perjured testimony, and gave up on the adversarial process was rejected; defendant failed to support his assertions with any factual basis or supporting affidavits, and his assertions lacked the specificity and detail required to establish a prima facie showing under

Miss. Code Ann. § 99-39-11(2), and he failed to show that but for his counsel's actions, the results of the trial court would have been different. *Hamlin v. State*, 853 So. 2d 841 (Miss. Ct. App. 2003).

### 3. Post-conviction relief improperly denied.

Where there were contradictory statements as to whether an appeal had been requested and whether defendant had been advised of his right to an appeal, he was entitled to an evidentiary hearing on the matter; therefore, the trial court erred in denying defendant's request for post-conviction relief. *Willis v. State*, 904 So. 2d 200 (Miss. Ct. App. 2005).

Trial court should have construed defendant's motion to vacate judgment as a motion for post-conviction relief and should have exercised jurisdiction over the matter. While it was true that he sought to vacate the 1999 judgment (pursuant to his guilty plea), it was clear that he was seeking relief which could have been properly brought pursuant to Mississippi's Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 et. seq., specifically pursuant to Miss. Code Ann. § 99-39-5; for example, he alleged due process violations and ineffective assistance of counsel, and in affidavits, he made allegations that counsel had promised him that his probation for a prior conviction would not be revoked upon his entering a guilty plea to the sale

of cocaine in the more recent offense. *Miller v. State*, 910 So. 2d 56 (Miss. Ct. App. 2005).

In a rape case, a trial court should have granted an inmate's petition for post-conviction relief based on newly discovered evidence because the testimony of a witness corroborated the inmate's allegation that the parties engaged in consensual sex after meeting in a bar, the testimony of other witnesses would have cast a doubt regarding whether or not the victim was raped, the new evidence was material and not merely impeaching, and the fact that one witness was named during trial did not mean that defense counsel failed to exercise due diligence. *Hunt v. State*, 877 So. 2d 503 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

**Cited in:** *Dearman v. State*, 910 So. 2d 708 (Miss. Ct. App. 2005).

### 4. Post-conviction relief properly granted.

Where petitioner's plea counsel was unaware that the law had changed and required convicted armed robbers to serve every day of their sentence, the post-conviction court set aside petitioner's fifteen-year sentence for armed robbery entered in accordance with the plea agreement. Counsel had erroneously informed petitioner that he would be eligible for parole after serving ten years of his sentence. *Hudson v. State*, 932 So. 2d 842 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**ALR.** Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post conviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Post conviction relief. 57 Miss. L. J. 524, August, 1987.

### § 99-39-3. Purpose.

(1) The purpose of this article is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this article repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of



Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief, including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this article. The enactment of this article does not affect any pre-conviction remedies.

(2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this article is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

**SOURCES:** Laws, 1984, ch. 378, § 2, eff from and after passage (approved April 17, 1984).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to “this chapter” was changed to “this article.” The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Editor’s Note** — Writ of error coram nobis (§ 99-35-145) was repealed by Laws of 1984, ch. 387, § 18, eff from and after April 17, 1984.

**Cross References** — Habeas corpus relief, see § 11-43-1 et seq.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Questions not raised in lower court.
3. Successive writs.
4. Pro se.
5. Habeas corpus.
6. Standing.
7. Exclusion of blacks from jury.

### 1. In general.

Appellate court affirmed the denial of an inmate’s petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3(2) as the inmate was unable to show that but for the alleged ineffective assistance of counsel he would not have pled guilty, and the inmate stated that he was pleased with his attorney’s representation at the plea hearing. *Ivy v. State*, 918 So. 2d 84 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate’s petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3 as the inmate was properly advised before pleading guilty, he was not deprived of effective assistance of counsel,

and his 30-year sentence for armed robbery with 15 years suspended was proper under Miss. Code Ann. § 97-3-79. *Steen v. State*, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate’s motion for post-conviction relief as the inmate filed the motion more than three years after his conviction and did not assert any of the tolling provisions in Miss. Code Ann. § 99-39-5(2). *Little v. State*, 918 So. 2d 97 (Miss. Ct. App. 2006).

Appellate court affirmed the summary dismissal of the inmate’s motion for post-conviction relief because the inmate was no longer serving time in a Mississippi prison when he filed the motion; thus, Miss. Code Ann. § 99-39-3 did not provide the inmate any relief. *Smith v. State*, 914 So. 2d 1248 (Miss. Ct. App. 2005).

Court properly treated a petition for a writ of error coram nobis as a motion for post-conviction relief because, pursuant to Miss. Code Ann. § 99-39-3(1), the post-conviction relief statutes replaced the writ



of error coram nobis. Accordingly, petitioner's motion was properly dismissed as time barred under the post-conviction relief statutes. *Morris v. State*, 918 So. 2d 807 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2006).

Where defendant answered questions from trial judge under oath, on the record, and in presence of counsel, during his plea hearing denying any coercion in pleading guilty, defendant's claim that his plea was involuntary was properly rejected. *Bradley v. State*, 845 So. 2d 756 (Miss. Ct. App. 2003).

Because Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act was defendant's exclusive remedy for post-conviction relief (PCR), the trial court correctly treated defendant's complaint for declaratory judgment as a petition for PCR; the motion was properly denied as untimely pursuant to Miss. Code Ann. § 99-39-5 (Rev. 2000). *Moore v. State*, 859 So. 2d 1018 (Miss. Ct. App. 2003).

Post-conviction proceedings are for purpose of bringing to trial court's attention to facts not known at time of judgment. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Post-conviction proceedings are for the purpose of bringing to the trial court's attention facts not known at the time of judgment. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Post-Conviction Collateral Relief Act provides procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal. *Williams v. State*, 669 So. 2d 44 (Miss. 1996); *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Post-conviction relief is not granted upon facts and issues which could or should have been litigated at trial or on appeal. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Procedural bars of waiver, different theories, and res judicata and exception thereto as defined in post-conviction relief statute are applicable in death penalty post-conviction relief applications. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The State Supreme Court was not required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

The Post-Conviction Relief Act is not a new concept in Mississippi jurisprudence; it merely codifies existing constraints on review traditionally practiced by the Supreme Court. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

The Post-Conviction Relief Act could be retroactively applied to a petitioner whose claim was grounded on a substantive portion of the Act, under which his rights had not really changed. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

The post-conviction collateral relief act is a codification of the law existing in Mississippi for many years. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

## **2. Questions not raised in lower court.**

Complaints raised by the inmate directly relating to the manner in which he was sentenced all existed immediately at the conclusion of the sentencing hearing and were, thus, appropriate matters for a direct appeal pursuant to Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act; because the inmate did not take a direct appeal, those issues were barred from

consideration in a post-conviction relief proceeding pursuant to Miss. Code Ann. § 99-39-21(1). *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. 2003), rev'd *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

Post-conviction relief does not lie for facts and issues which were litigated at trial or on direct appeal, or which could or should have been litigated at trial and on appeal. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The rule that questions not raised in the lower court will not be reviewed on appeal to the Supreme Court applies to the Supreme Court's review of appeals involving collateral attacks originating in the lower court as well as its review of convictions flowing in the wake of direct appeal, and is particularly true where constitutional questions are involved; thus, a post-conviction relief petitioner, by failing to attack the constitutionality of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) in the lower court, waived any error in this regard and could not seek reversal of the trial court's ruling in the Supreme Court. *Patterson v. State*, 594 So. 2d 606 (Miss. 1992).

### 3. Successive writs.

A trial court correctly denied, as a successive writ, a defendant's second motion for post-conviction relief, even though the second pleading was denominated as a "Petition for Habeas Corpus Post-Conviction Relief," since the Post-Conviction Collateral Relief Act effectively supplanted the prior statutory and rule versions of the writ of habeas corpus so that the defendant's habeas petition would be treated as a petition for post-conviction relief filed pursuant to the Post-Conviction Relief Act. *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).

### 4. Pro se.

Where a prisoner is proceeding pro se, the court takes that fact into account and, in its discretion, credits not so well pleaded allegations, to the end that a prisoner's meritorious complaint may not be lost because it was inartfully drafted. *Moore v. Ruth*, 556 So. 2d 1059 (Miss. 1990).

### 5. Habeas corpus.

Petitioner was not denied his right to a writ of habeas corpus when his notice of

appeal in writ of state habeas corpus was denied as a successive writ; the Mississippi Legislature had enacted a comprehensive procedure for post-conviction relief through the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-3(1). *Austin v. State*, 914 So. 2d 1281 (Miss. Ct. App. 2005).

Other issues which were either presented through direct appeal or could have been presented on direct appeal or at trial are procedurally barred on post-conviction relief motion and cannot be relitigated under guise of poor representation by counsel. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A trial court correctly denied, as a successive writ, a defendant's second motion for post-conviction relief, even though the second pleading was denominated as a "Petition for Habeas Corpus Post-Conviction Relief," since the Post-Conviction Collateral Relief Act effectively supplanted the prior statutory and rule versions of the writ of habeas corpus so that the defendant's habeas petition would be treated as a petition for post-conviction relief filed pursuant to the Post-Conviction Relief Act. *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, [former] Miss.Sup.Ct.R. 9 or [former] Unif.Crim.R.Cir.Ct.Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the



Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738 (Miss. 1990).

A petitioner's petition for a writ of habeas corpus would be treated as a motion under § 99-39-5(1)(g), which authorizes a post-conviction motion in the nature of collateral review by the petitioner, since she was in custody under a Mississippi conviction and claimed that she was "unlawfully held in custody." Although the petitioner was convicted in 1981, and the conviction was affirmed on direct appeal in 1983, the substantive portions of the Post-Conviction Relief Act, which became effective April 17, 1984, were applicable to the petition. Furthermore, the waiver and procedural bar provisions of the Act were applicable even though the petitioner was tried and convicted prior to the effective date of the Act. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

### 6. Standing.

A defendant did not have standing to challenge the constitutionality of the Post-Conviction Relief Act, this section, inasmuch as he was afforded all of his constitutional rights and had not been disadvantaged by the Act. *Aldridge v. State*, 524 So. 2d 330 (Miss. 1988).

A defendant lacked standing to challenge the constitutionality of the Uniform

Post-Conviction Relief Act (§ 99-39-3) where he failed to point to any right, privilege or opportunity that had been denied him by the act but which he would have enjoyed had the act never been passed. *Reynolds v. State*, 521 So. 2d 914 (Miss. 1988).

### 7. Exclusion of blacks from jury.

Notwithstanding the later publication of a newspaper article and the taking of a deposition bearing on the issue, defendant was not entitled to leave to proceed in the trial court pursuant to the post-conviction collateral relief act in order to assert the issue of the exclusion of blacks from the trial jury where, although he knew at the time of trial that the state had used all of its peremptory challenges to exclude blacks, no motion or objection concerning such action was entered, nor was the issue raised on appeal, nor was it raised in defendant's 2 subsequent petitions for writ of error coram nobis. *Smith v. State*, 500 So. 2d 973 (Miss. 1986).

A petitioner seeking to vacate or set aside his judgment of conviction and sentence of death could not successfully raise for the first time the issue of exclusion of blacks from the jury where more than 4 years had elapsed since the date the guilty plead had been entered, the sentencing jury impaneled, and the death sentence imposed, and, in the interim, at least 3 different sets of counsel had worked on the case. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

## RESEARCH REFERENCES

**ALR.** Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Propriety of federal court's considering state prisoner's petition under 28 USCS § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition. 43 A.L.R. Fed. 631.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Post conviction relief. 57 Miss. L. J. 524, August, 1987.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.



**§ 99-39-5. Grounds for relief; time limitations.**

(1) Any prisoner in custody under sentence of a court of record of the State of Mississippi who claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That his plea was made involuntarily;

(g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(h) That he is entitled to an out-of-time appeal; or

(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal.

(2) A motion for relief under this article shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this article shall be subject to the provisions of Section 99-19-42.

**SOURCES:** Laws, 1984, ch. 378, § 3; Laws, 1995, ch. 566, § 3; Laws, 2000, ch. 569, § 12, eff from and after July 1, 2000.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to “this chapter” was changed to “this article.” The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Editor’s Note** — Laws of 2000, ch. 569, § 1, provides:

“SECTION 1. Sections 1 through 18 of this act may be cited as the ‘Mississippi Capital Post-Conviction Counsel Act.’”

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

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### I. UNDER CURRENT LAW.

#### 1. In general.

Court is not always required to return a post-conviction relief motion that fails to

comply with statutory requirements, and therefore a motion that did not contain a concise statement of the statement or grounds upon which the motion was based, as required by Miss. Code Ann. § 99-39-9(1)(c), and did not state a claim upon which relief could have been granted under Miss. Code Ann. § 99-39-5(1), was properly not returned; the determination of whether to return the motion to defendant was left to the trial court since it did not comply with the statutory requirements, and it could not have survived a dismissal under Miss. Code Ann. § 99-39-11(2). *Adams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. Feb. 6, 2007).

Circuit court did not err in refusing to grant defendant’s request for designation of the record under Miss. R. App. P. 10(b)(1) where, pursuant to Miss. Code Ann. § 99-39-5, his desire to pursue a civil action was not a ground for relief; the request failed to comply with Miss. Code Ann. § 99-39-9. *Willis v. State*, 950 So. 2d 200 (Miss. Ct. App. 2006).

Defendant’s motion for post-conviction relief was untimely under Miss. Code Ann. § 99-39-5(2) because he filed his petition more than three years after the trial court accepted his plea of guilty and imposed the twenty-year sentence. *Smith v. State*, 922 So. 2d 43 (Miss. Ct. App. 2006).

Appellate court affirmed the summary dismissal of the inmate’s motion for post-conviction relief because the inmate was no longer serving time in a Mississippi prison when he filed the motion; thus, Miss. Code Ann. § 99-39-5 did not provide

the inmate any relief. *Smith v. State*, 914 So. 2d 1248 (Miss. Ct. App. 2005).

Dismissal of an inmate's motion for post-conviction relief was affirmed as the inmate had already served the sentence of which he complained in the motion and was currently serving time in a federal prison. Thus, because Miss. Code Ann. § 99-39-5 applied only to those inmates who were actually in custody of the state under a sentencing order from a Mississippi state court, the inmate was not entitled to relief. *Durant v. State*, 914 So. 2d 295 (Miss. Ct. App. 2005).

Defendant misinterpreted the law in trying to set aside his modified sentence of probation. If that sentence had been determined to be illegal under former Miss. Code Ann. § 47-7-33(1), which prohibited a sentencing judge from suspending a sentence or placing a convicted felon on probation, the trial court's earlier sentencing order in which he was given jail time would have taken effect; defendant was not entitled to post-conviction relief where he had pled guilty and later received a more lenient modified sentence, and in any event, his action was time barred pursuant to Miss. Code Ann. § 99-39-5. *Wallace v. State*, 906 So. 2d 841 (Miss. Ct. App. 2004).

In a post-conviction action, the trial court did not err in refusing to treat defendant's motion as a Miss. R. Civ. P. 60 motion where he was merely attempting to relitigate the case. *Trotter v. State*, 907 So. 2d 397 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Claims asserted by defendant in his appeal fell within the provisions of Miss. Code Ann. § 99-39-5(a) and (g) and should have been presented in his first post-conviction relief motion; when he filed his first motion, his probation had already been revoked. *Walker v. State*, 910 So. 2d 584 (Miss. Ct. App. 2005).

Defendant's argument that the indictment against him was defective was barred pursuant to Miss. Code Ann. § 99-39-5(2); defendant previously presented the argument in his motion to vacate and set aside his conviction and sentence and the circuit court judge ruled appropriately. *Beene v. State*, 910 So. 2d 1152 (Miss. Ct. App. 2005).

Trial and appellate courts were without jurisdiction to address defendant's motion for post-conviction relief where defendant had completed his sentence at the time he filed the motion and was no longer in custody under the conviction and sentence. *Wheeler v. State*, 903 So. 2d 756 (Miss. Ct. App. 2005).

Defendant maintained the circuit court's sentencing order was illegal because according to Miss. Code Ann. § 47-7-33(1), he could not be given a suspended sentence since he was a priorly convicted felon. While that was true, and his action was not time barred, he had stood mute when he was handed an illegal sentence which was more favorable than what the legal sentence would have been; thus, he was not entitled to relief in his post-conviction action. *Hughery v. State*, 915 So. 2d 457 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2005).

Trial court should have construed defendant's motion to vacate judgment as a motion for post-conviction relief and should have exercised jurisdiction over the matter. While it was true that he sought to vacate the 1999 judgment (pursuant to his guilty plea), it was clear that he was seeking relief which could have been properly brought pursuant to Mississippi's Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 et. seq., specifically pursuant to Miss. Code Ann. § 99-39-5; for example, he alleged due process violations and ineffective assistance of counsel, and in affidavits, he made allegations that counsel had promised him that his probation for a prior conviction would not be revoked upon his entering a guilty plea to the sale of cocaine in the more recent offense. *Miller v. State*, 910 So. 2d 56 (Miss. Ct. App. 2005).

Defendant's escape and absence for seven years before recapture so delayed the onset of appellate proceedings pertaining to his kidnapping conviction and sentencing that the State, as a matter of law, would have been prejudiced in locating witnesses and presenting evidence at a possible retrial. Thus, the "fugitive dismissal" rule applied, and defendant was not entitled to an out-of-time appeal. *Hires v. State*, 882 So. 2d 225 (Miss. 2004).



Defendant's 1978 escape (defendant was captured in 1985) so delayed the onset of appellate proceedings pertaining to defendant's kidnapping conviction and sentencing that the State would have been prejudiced in locating witnesses and presenting evidence at a possible retrial, and therefore, the fugitive dismissal rule precluded defendant's right to an appeal; secondly, defendant's post-conviction claims pertaining to defendant's guilty plea on the charge of escape and the enhanced sentence as a habitual offender were time barred under Miss. Code Ann. § 99-39-5. *Hires v. State*, — So. 2d —, 2004 Miss. LEXIS 689 (Miss. June 17, 2004).

Although defendant failed to attach any affidavits or statements of "good cause" explaining why an affidavit of facts could not be obtained, the trial court's order denying post-conviction relief stated as a basis for denying relief a position that was contrary to the law; where the State sought to revoke defendant's probation based upon an allegation of criminal activity, it had to show proof of an actual conviction, or that a crime had been committed and that it was more likely than not that the probationer had committed the offense; an arrest was insufficient. *Brown v. State*, 864 So. 2d 1058 (Miss. Ct. App. 2004), cert. denied, 866 So. 2d 473 (Miss. 2004).

Sentence imposed on defendant was illegal and contrary to public policy; although the statute of limitations to correct defendant's sentence had long ago expired, an exemption from that time bar applied, where the revocation of the option of parole ab initio was sufficient grounds for relief under Miss. Code Ann. § 99-39-5(2), but the relief provided the State with the option to pursue the death penalty. *Twillie v. State*, — So. 2d —, 2003 Miss. App. LEXIS 959 (Miss. Ct. App. Oct. 21, 2003).

Where the time to appeal from an initial sentencing order had expired because defendant's post-trial motions to correct "scrivener's errors" in the sentencing order had not tolled the running of the appeal period under Miss. R. App. P. 4(e)(g), the appellate court treated the motions to correct the sentencing orders

that were filed in the trial court as motions under the Mississippi Uniform Collateral Post-Conviction Relief Act. *Norwood v. State*, 846 So. 2d 1048 (Miss. Ct. App. 2003).

As the Mississippi Uniform Post-Conviction Collateral Relief Act was the legal vehicle for judicial redress of a prisoner's claim that the trial court was without jurisdiction to impose sentence, Miss. Code Ann. § 99-39-5, where a defendant claimed that the trial court was without statutory jurisdiction to include a "day for day without the benefit of parole or probation" provision in its sentencing order, the trial court possessed the authority to rule on his motions to correct the sentence. *Norwood v. State*, 846 So. 2d 1048 (Miss. Ct. App. 2003).

Defendant was not entitled to a new trial on the charge of burglary after a petition for post-conviction relief was granted on an armed robbery charge because defendant had already fully served the time imposed by the time the petition was filed. *Weaver v. State*, 852 So. 2d 82 (Miss. Ct. App. 2003).

In a challenge to the banishment provision of defendant's sentence pursuant to Miss. Code Ann. § 99-39-5(1)(a), the substitution of some period of formal probationary supervision in place of a like term of banishment did not constitute an increase in the degree or character of defendant's punishment that would invoke constitutional concerns of double jeopardy, U.S. Const. Amend. V, and the requirement of supervised probation was essentially rehabilitative in its objectives and not punitive; thus, the change in probation terms was within the circuit court's authority as contained in Miss. Code Ann. § 47-7-35. *Weaver v. State*, 856 So. 2d 407 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Where defendant did not appeal the sentence imposed following his guilty plea within 30 days of the entry of the order and did not move within 180 days of the order to reopen the appeal, defendant's appeal was procedurally barred, and defendant's proper remedy was post-conviction relief. *Watson v. State*, 841 So. 2d 218 (Miss. Ct. App. 2003).

The Mississippi Uniform Post-Conviction Collateral Relief Act is the legal rem-

edy for claims by prisoners who contend that their guilty pleas were involuntary. *Scott v. State*, 817 So. 2d 642 (Miss. Ct. App. 2002).

Dismissal from the pretrial intervention program is not a proper basis for post-conviction relief. *Anderson v. State*, 795 So. 2d 591 (Miss. Ct. App. 2001).

House arrest is not a form of probationary release and a prisoner under house arrest is confined as a prisoner under the jurisdiction of the Department of Corrections in the normally-understood sense of that term; thus, post-conviction relief is an inappropriate remedy for a prisoner to pursue after he is removed from house arrest and returned to the general prison population. *Lewis v. State*, 761 So. 2d 922 (Miss. Ct. App. 2000).

Statute of limitations with respect to filing of petition for post-conviction relief from death sentence did not begin to run until close of murder defendant's direct appeal, despite fact that conviction was result of guilty plea rather than jury verdict, and petition for collateral review filed within three years of denial of rehearing of defendant's petition for certiorari in United States Supreme Court from decision of state Supreme Court in his direct appeal was therefore timely filed. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

Provision of post-conviction relief statute requiring that petition for relief be filed within three years after entry of judgment of conviction upon plea of guilty is directed toward guilty pleas that are not attended by direct appeals; cases in which direct appeals have been taken are subject to express language tolling running of time limitation during pendency of such appeals. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) *Booker v. State*, 699 So. 2d 132 (Miss. 1997).

Post-Conviction Collateral Relief Act provides procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Appropriate standard for trial court in reviewing post-conviction motion for new trial is whether petitioner has proved by a preponderance of evidence that material facts exist which had not previously been heard and which require vacation of conviction or sentence. *Turner v. State*, 673 So. 2d 382 (Miss. 1996).

Recanting affidavit of coindictor who testified against capital murder defendant did not undermine confidence in outcome of original verdict against defendant so as to warrant new trial, despite allegation that prosecution entered into undisclosed plea bargain for coindictor's testimony, where coindictor recanted testimony but stated that testimony had been "colored" rather than perjured, coindictor later recanted his recantation of his testimony by repeatedly stating in hearing on motion for new trial that he had "no deal" with prosecution, coindictor's testimony during hearing corroborated the testimony of 3 prosecutors, one of coindictor's attorneys submitted affidavit 6 years after the fact stating that there had been plea bargain, coindictor's co-counsel stated in side bar at hearing that he was unaware of any plea agreements and same attorney never executed any affidavit confirming or denying existence of plea bargain, there was no written plea bargain agreement in the record, and it would have been unusual for coindictor to agree to 5 year sentence in exchange for his testimony when maximum sentence faced by coindictor was 5 years. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

The death of a defendant who has perfected his or her right to appeal does not render the appeal moot and leave his or her conviction permanently in place. (Overruling *Berryhill v. State* (Miss. 1986) 492 So. 2d 288 and *Haines v. State* (Miss. 1983) 428 So. 2d 590.) *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).



A defendant was entitled to an out-of-time appeal under subsection (1)(h) of this section where the defendant initially told his attorney that he did not want to appeal and signed a written memorandum to that effect, but, while the defendant was incarcerated, his grandfather made 3 requests on his behalf to the attorney for an appeal; these requests, which were made within 30 days of the judgment imposing sentence, were sufficient to revoke the defendant's waiver of his right to appeal. *Minnifield v. State*, 585 So. 2d 723 (Miss. 1991).

Acquittal in a criminal proceeding does not per se preclude parole revocation predicated upon the same charge. The terms and conditions of parole are broader than a mere directive that the parolee commit no felony. Additionally, there are differing burdens of proof in a criminal prosecution and in a parole revocation proceeding; at a criminal trial, the prosecution must prove the accused guilty beyond a reasonable doubt while in parole revocation proceedings, the accused is generally protected by lesser standards of proof. Thus, the failure of a jury to find one guilty beyond a reasonable doubt does not mean that, by some lesser standard, the facts and circumstances may not be found to be a violation of the terms and conditions of parole. However, where a prisoner was acquitted of the crime of rape, with which he had been charged while on parole, the acquittal might have meant that the prisoner was not guilty of any act which constituted a violation of the terms and conditions of his parole and, therefore, the acquittal on the criminal charge meant at the very least that, before his parole could be revoked, the State was required to offer actual proof that he committed an act violating the terms and conditions of his parole, and the mere fact that he was arrested and charged with rape would not suffice. *Moore v. Ruth*, 556 So. 2d 1059 (Miss. 1990).

Pro se defendant not barred from seeking relief under Post-Conviction Collateral Relief Act arising from guilty plea entered in 1979, although motion to vacate was not filed until 1986, where 3 year limitation period had been held to operate prospectively only. *Jackson v. State*, 506 So. 2d 994 (Miss. 1987).

Notwithstanding the later publication of a newspaper article and the taking of a deposition bearing on the issue, defendant was not entitled to leave to proceed in the trial court pursuant to the Post-Conviction Collateral Relief Act in order to assert the issue of the exclusion of blacks from the trial jury where, although he knew at the time of trial that the state had used all of its peremptory challenges to exclude blacks, no motion or objection concerning such action was entered, nor was the issue raised on appeal, nor was it raised in defendant's 2 subsequent petitions for writ of error coram nobis. *Smith v. State*, 500 So. 2d 973 (Miss. 1986).

If parolee's petition for mandamus, which sought to compel the chairman of the Mississippi Parole Board to either return parolee from Colorado to Mississippi for parole revocation hearing or to hold a revocation hearing in his absence, should be treated as a motion under this section, for relief on grounds his parole was unlawfully revoked, parolee would not be entitled to relief in view of language in § 47-7-27. *Bobkoskie v. State*, 495 So. 2d 497 (Miss. 1986).

Impeachment evidence as well as exculpatory material comes within the scope of the Brady rule; failure to produce does not depend upon the good faith or bad faith of the prosecution, nor upon the specificity of the defense request. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

## 2. Evidentiary hearing.

Trial court did not err in revoking an inmate's probation based on hearsay testimony regarding charges that were later dismissed, as the Mississippi Rules of Evidence, including the hearsay rule, did not apply to probation revocation hearings, and the burden of proof at such a hearing was "more likely than not," rather than "beyond a reasonable doubt." *Forshee v. State*, 853 So. 2d 136 (Miss. Ct. App. 2003).

Removing defendant from the pretrial intervention program without affording him a hearing did not violate any of his constitutional rights, as he had no right to participate in the program, and his right to a jury trial on the original charges was unaffected by the revocation. *Anderson v.*



State, 795 So. 2d 591 (Miss. Ct. App. 2001).

Circuit court's failure at sentencing hearing to elicit responses from defendant regarding his desire to appeal his case, his understanding of time frame in which he could make appeal and his financial ability to pursue appeal did not entitle defendant to out-of-time appeal, where defense counsel obtained signed witness statement indicating that defendant did not wish to appeal immediately following sentencing hearing, and circuit court conducted full-scale evidentiary hearing as to whether to allow out-of-time appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Defendant's affidavit in post-conviction proceeding, alleging claims that were totally contrary to his sworn testimony given before trial court at time he entered his guilty plea to capital murder, did not require evidentiary hearing, where record was clear as to facts presented to trial court before guilty pleas were accepted, indicating that affidavit was a "sham." *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Evidentiary hearing was required in post-conviction proceeding to determine whether defendant's attorney failed to inform him of his right to appeal conviction where attorney's response to defendant's petition for out-of-time appeal stated generally that he advised defendant of options and that he specifically advised defendant that district attorney would drop other pending charges if defendant would forego his appeal, and defendant stated only that he was not going to appeal his conviction, but nothing showed that defendant had been informed of his right to appeal. *Summerville v. State*, 667 So. 2d 14 (Miss. 1996).

To be entitled to evidentiary hearing on merits of ineffectiveness of counsel claim, defendant must establish prima facie claim on both prongs of Strickland test by alleging with specificity and detail that his counsel's performance was deficient and that the deficient performance prejudiced defense so as to deprive him of fundamentally fair trial. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Evidentiary hearing is not necessary where allegations in petition for post-con-

viction relief are specific and conclusory. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A defendant was not entitled to an evidentiary hearing on his motion for post-conviction relief where the petition was time barred under subsection (2) of this section, and the defendant's allegations were insufficient to require the trial court to grant an evidentiary hearing where his claims were based primarily on the allegation that a witness was available to testify that the crime with which the defendant was charged had been committed by another person and that the witness was not available to make an affidavit because the defendant was incarcerated. *Campbell v. State*, 611 So. 2d 209 (Miss. 1992).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

Defendants were not entitled to an evidentiary hearing on their claims that they were denied the right to testify in their own defense at trial, where their claims were based on allegations that they received substantial advice from their attorneys that it would be contrary to their interests to testify and that they were unaware of the right of allocution, but the defendants did not suggest that they ever questioned their attorneys regarding their rights in this regard nor was there any suggestion that the attorneys gave any dubious legal advice on this point. *Jaco v. State*, 574 So. 2d 625 (Miss. 1990).

Remand for evidentiary hearing was required on questions of whether plea bargain existed prior to trial and, if it did, whether terms of agreement so affected codefendant's credibility as to undermine confidence in outcome of trial, where defendant alleged that it was not disclosed to him prior to trial that state witness was given most lenient sentence for armed robbery in exchange for his testimony. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

### 3. Guilty plea, voluntariness.

Trial court, after reviewing the inmate's criminal file, found that his counsel and the district attorney negotiated a plea bargain in which he would plead guilty to one count of statutory rape and the second count would be retired to the files; thus, the inmate received adequate notification of the applicable sentencing range, and the trial court did not err in accepting the inmate's guilty plea, and therefore the trial court properly denied the inmate's petition for postconviction relief. *Brooks v. State*, 953 So. 2d 291 (Miss. Ct. App. 2007).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief because based on the documents signed at the plea hearing and the statements the inmate made in response to the judge's questions, all evidence indicated that the inmate's plea was knowingly and voluntarily made. *Boyett v. State*, 924 So. 2d 577 (Miss. Ct. App. 2005).

Where petitioner asserted guilty plea was induced through an unfulfilled promise that the prosecutor would not make a sentencing recommendation and that counsel made misrepresentations that no sentence recommendation would be made, petitioner provided nothing but an unsworn letter from former counsel to support the claim of misrepresentation, and provided the appellate court with no proof that a plea agreement existed; thus, petitioner failed to meet petitioner's burden of establishing a case for post-conviction relief. *Jones v. State*, 885 So. 2d 83 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Defendant claims that defendant's plea was involuntary and that counsel was ineffective were contradicted both by de-

fendant's sworn statements given in defendant's petition to enter a guilty plea, and in front of the trial court at the plea hearing; defendant stated that defendant disclosed all the information relating to the crime to counsel, and that counsel advised defendant of all possible defenses, moreover, defendant had testified under oath that defendant fully understood the consequences of his plea. Any claim of innocence simply could not survive, and the trial court properly denied post-conviction relief. *Herrod v. State*, 901 So. 2d 635 (Miss. Ct. App. 2004).

Post-conviction relief under Miss. Code Ann. § 99-39-5 was properly denied where the record of the plea hearing refuted an inmate's claims that his guilty plea to armed robbery was made unknowingly and involuntarily and that he wasn't told his plea would be self incriminating. *Fairley v. State*, 822 So. 2d 1015 (Miss. Ct. App. 2002).

The defendant was not entitled to post-conviction relief on the ground that he was not advised of his constitutional rights prior to his plea of guilty as the evidence established that the defendant was fully aware of the repercussions of his guilty plea and was well informed about the details of the plea bargain arrangement and, therefore, did plead guilty knowingly, intelligently, and voluntarily. *Myers v. State*, 767 So. 2d 1058 (Miss. Ct. App. 2000).

If defendant's guilty pleas were involuntary, then not only defendant's sentences, but also his or her guilty pleas, must be vacated, even though defendant only sought to vacate sentences and did not specifically seek to vacate pleas. *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

Defendant's guilty pleas were not "voluntarily" given and, thus, both pleas and defendant's sentence would be vacated; although defendant, as habitual and subsequent offender, was familiar with criminal justice system, and he was advised by sources other than trial court that he was waiving right to jury trial, right to confront and cross-examine witnesses, and right against self-incrimination, no one, either in open court or in chambers, advised defendant that he could be sentenced to no less than 30-year mandatory



sentence without parole, and there was justifiable basis for defendant to believe that, if he cooperated with narcotics task force by working as undercover informant, he could receive sentence of less than statutory minimum. *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

Postconviction petitioner is entitled to evidentiary hearing if he raises questions of fact regarding counsel's deficiencies or any prejudice resulting therefrom. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Finding that counsel was ineffective requires remand for new trial. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Defendant was not prejudiced in post-conviction proceeding when trial court refused to grant his request for transcript of hearing in which he pleaded guilty to capital murder, where record was amended to include transcript of plea proceeding, and affidavit in which defendant challenged voluntariness of his plea was inconsistent with transcript. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. *Smith v. State*, 636 So. 2d 1220 (Miss. 1994).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a \$1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. *Eley v. State*, 631 So. 2d 787 (Miss. 1994).

A defendant was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading guilty. Al-

exander v. State, 605 So. 2d 1170 (Miss. 1992).

A circuit court properly summarily dismissed a defendant's post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel, where a transcript of the plea hearing showed that the trial court fully informed the defendant of the maximum sentence for the crime charged in the indictment and the effect of the habitual criminal statute if he subsequently committed another crime of violence and that the defendant acknowledged to the court that no one had threatened, abused or mistreated him in any way or promised him anything to cause him to wish to plead guilty, and the defendant did not contend that he lied to the court because of misrepresentations by his attorney. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his postconviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

The failure of a trial court to inform the defendant of the minimum and maximum sentences which the court could impose rendered his guilty pleas involuntary and required vacation of the pleas. *Mallett v. State*, 592 So. 2d 524 (Miss. 1991).

A defendant's complaint sufficiently stated a claim for postconviction relief on the ground that his guilty plea was involuntary, and therefore his complaint should not have been dismissed on its face, where the defendant alleged that his attorney told him that he would receive a sentence of less than 12 years if he entered a guilty plea, and the defendant entered a plea of guilty whereupon he was sentenced to 16 years' imprisonment. Although a mere expectation or hope of a lesser sentence than might be meted out after conviction upon a trial by jury generally not be sufficient to entitle a



defendant to relief in such a case, the assurance of a 12-year cap on his sentence constituted a "firm representation" rather than a "mere expectation" of such a lesser sentence, and therefore provided a basis for relief. *Myers v. State*, 583 So. 2d 174 (Miss. 1991).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him or her, including an understanding of the charge and its relation to him or her, what effect the plea will have, and what the possible sentence might be because of the plea. Where a defendant is not informed of the maximum and minimum sentences he or she might receive, his or her guilty plea has not been made either voluntarily or intelligently. A complete record should be made to ensure that the defendant's guilty plea is voluntary. While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal. *Wilson v. State*, 577 So. 2d 394 (Miss. 1991).

A petitioner was not entitled to have his guilty pleas set aside on the grounds that they were made involuntarily and without effective assistance of counsel where the petitioner was a college graduate, prior to entering a guilty plea he had a long-standing knowledge of the charges and a notice and understanding of the severity of the charges and should have had an understanding of the severity of the potential punishment, he had the opportunity to consult with his attorney or to consult with any other attorney concerning the charges pending against him, he sought counselling and underwent therapy at a mental health center and had contact with other institutions all of which should have assisted him in intelligently weighing the consequences of the charges and of a plea of guilty, and at the time of entering his plea of guilty, he was specifically asked whether he was satisfied with

his attorney's services and responded "very much so"; the petitioner apparently knowingly, willfully, freely, and voluntarily chose to abort his trial by announcing in open court that he desired to change his plea from not guilty to guilty and at that instance raised no complaint about counsel or about the judicial proceedings, and therefore his petition for postconviction relief would be dismissed. *Schmitt v. State*, 560 So. 2d 148 (Miss. 1990). But see *Weatherspoon v. State*, 736 So. 2d 419 (Miss. Ct. App. 1999).

#### 4. —Explanation of rights.

In advising defendant of consequences of guilty plea, it is not sufficient for court to merely ask defendant generally if his or her constitutional rights have been explained, nor is it sufficient to simply have defendant sign printed form advising court that defendant has been sufficiently advised of his or her rights; rather, court must go further and determine in face-to-face exchange in open court that the accused knows and understands rights to which he or she is entitled. *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

Requirement that judge inquire and determine that accused understands maximum and minimum penalties provided by law prior to accepting guilty plea means that judge must advise defendant of minimum number of years of imprisonment specified by statute pursuant to which defendant is being sentenced, if any such minimum number of years is provided; where statute specifies no minimum number of years of imprisonment, judge is not obligated to inform defendant that no minimum sentence is provided, or that minimum penalty defendant faces is "zero." *Bevill v. State*, 669 So. 2d 14 (Miss. 1996).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State

intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. *Smith v. State*, 636 So. 2d 1220 (Miss. 1994).

A circuit court properly summarily denied a defendant's postconviction relief motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. *Lott v. State*, 597 So. 2d 627 (Miss. 1992).

A defendant who pleaded guilty without an affirmative expression by the trial court informing him that by pleading guilty he waived his constitutional right against self-incrimination, was entitled to an evidentiary hearing on the issue of whether his guilty plea was involuntarily and unintelligently made. Although the defendant's petition to the court to accept his plea of guilty recited that there was "no constitutional right or reason why this court should not accept this plea and enter sentence thereon," this was not sufficient to show that he was advised or informed of his constitutional right against self-incrimination. *Horton v. State*, 584 So. 2d 764 (Miss. 1991).

Before a person may plead guilty to a felony, he or she must be informed of his or her rights, the nature and consequences of the act he or she contemplates, and any other relevant facts and circumstances. Thus, a defendant who was not advised of the mandatory minimum sentence for the charge to which he was pleading, and who was ignorant of the mandatory minimum

sentence at the time he plead guilty, was entitled to withdraw his plea of guilty, enter a plea of not guilty and be given a trial, since the failure to advise the defendant of the minimum penalty rendered his guilty plea involuntary as a matter of law. *Vittitoe v. State*, 556 So. 2d 1062 (Miss. 1990).

#### **5. Ineffective assistance of counsel.**

Post-conviction relief was denied in a case where defendant entered a guilty plea to sexual offenses because he did not receive ineffective assistance of counsel; the decision to submit him to a mental evaluation prior to the entry of a plea rested with the judge, there was no failure to investigate or interview witnesses where the information was provided to the defense, the information provided did not rise to the level exculpatory evidence, and defense counsel did not misrepresent the sentence to defendant's parents. *McNeal v. State*, 951 So. 2d 615 (Miss. Ct. App. 2007).

Parties did not stipulate that the record was adequate to allow the appellate court to make the finding of ineffective assistance of counsel without consideration of the findings of fact of the trial judge, and the record did not affirmatively show ineffectiveness of constitutional dimensions; accordingly, defendant could raise his ineffective assistance of counsel claim in a post-conviction relief proceeding. *Terrell v. State*, 952 So. 2d 998 (Miss. Ct. App. 2006).

Where defendant waited six years to file a motion for post-conviction relief, counsel's ineffective assistance in pursuing a speedy trial claim was not an exception to the time bar. Defendant failed to show actual prejudice that may have denied him any fundamental constitutional rights. *Thomas v. State*, 933 So. 2d 995 (Miss. Ct. App. 2006), cert. denied, 933 So. 2d 982 (Miss. 2006).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate did not establish that he was deprived of effective assistance of counsel during his plea hearing, because his mother and his sister testified that the inmate's attorney had told him that he would be pleading guilty to simple assault and would be sentenced to time served,



and that testimony directly contradicted the inmate's testimony at the actual plea hearing where he acknowledged that he was pleading guilty to aggravated assault. *Riggs v. State*, 912 So. 2d 162 (Miss. Ct. App. 2005).

Denial of an inmate's motion for post-conviction relief was affirmed as the inmate's claim that his guilty plea was not knowing and voluntary due to his counsel's alleged deficient performance was contradicted by the inmate's statements at the plea hearing that he understood the consequences of his plea and was satisfied with his counsel's performance. *Gonzales v. State*, 915 So. 2d 1108 (Miss. Ct. App. 2005).

Mississippi Supreme Court has not held that merely raising a claim of ineffective assistance of counsel in a post-conviction application is sufficient to surmount the time bar of Miss. Code Ann. § 99-39-5(2). *Chancy v. State*, 938 So. 2d 267 (Miss. Ct. App. 2005).

Denial of the inmate's motion for post-conviction relief was proper pursuant to Miss. Code Ann. § 99-39-5(1)(e) where his counsel was not ineffective for refusing to interview witnesses because the attorney believed that their testimony was perjured testimony. *Johns v. State*, 925 So. 2d 840 (Miss. Ct. App. 2005).

Inmate's post-conviction claim that his counsel was ineffective, filed over five years after his guilty plea, was procedurally barred pursuant to Miss. Code Ann. § 99-39-5(2), notwithstanding his claim that an ineffective assistance of counsel claim was a fundamental right that was not barred. *Forshee v. State*, 853 So. 2d 136 (Miss. Ct. App. 2003).

No support existed for the defendant's post-conviction claim that he was denied the effective assistance of counsel due to his counsel's failure to fully investigate the facts of the defendant's case and explore the possibility that various purported witnesses could have provided evidence tending to absolve the defendant from guilt; the defendant failed to show that any witnesses who could exonerate him existed and that the unavailability of potentially favorable witnesses was due to the defense counsel's failure to adequately pursue this avenue of defense. *Davidson v.*

*State*, 850 So. 2d 158 (Miss. Ct. App. 2003).

Inmate's application for post-conviction relief was denied as the claims were without merit, barred by the doctrine of res judicata, procedurally barred as a successive writ under Miss. Code Ann. § 99-39-27(9), and time barred pursuant to Miss. Code Ann. § 99-39-5(2); the inmate had already raised the argument of the "intervening decision," had not presented any new evidence that was not reasonably discoverable at trial or that would have caused a different result if introduced, nor had the inmate provided evidence of any violation of any fundamental rights, the inmate failed to demonstrate that the claims were not procedurally barred pursuant to Miss. Code Ann. § 99-39-21(6), and failed to prove ineffective assistance of counsel. *Wiley v. State*, 842 So. 2d 1280 (Miss. 2003).

Defense counsel's failure to file appeal, to advise defendant of 30-day time period in which appeal was required to be filed, and to file motion for out-of-time appeal was not ineffective assistance of counsel in murder case, where defendant had signed statement showing that he had been advised of his right to appeal and did not desire to do so. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Supreme Court looks at totality of circumstances to determine whether counsel's efforts were both deficient and prejudicial, when evaluating claim of ineffective assistance of counsel. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

There is strong but rebuttable presumption that counsel's conduct falls within wide range of reasonable professional assistance; only where it is reasonably probable that but for attorney's errors, outcome of trial would have been different, will Supreme Court find that counsel's performance was deficient. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Defense counsel did not provide ineffective assistance of counsel to capital murder defendant at sentencing phase by failing to provide jury psychological report prepared by neutral expert, and instead



providing school records, to demonstrate defendant's limited intelligence level, or by failing to conduct further investigation into defendant's mental state; report indicated defendant had capacity to conform his behavior to requirements of law, admitting such damaging document into evidence would leave jury with impression defendant knew right from wrong and could not care less about his actions or consequences thereof and would defeat defense strategy that others convinced defendant to rob store clerk, and that his feeble mind was too weak not to succumb to influence of others, and parental pleas and school transcripts were best argument counsel could make. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In any ineffectiveness of counsel case, particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying heavy measure of deference to counsel's judgment. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Defense counsel did not provide ineffective assistance of counsel to capital murder defendant at sentencing phase by failing to present more witnesses than defendant's parents as to defendant's upbringing, childhood, and dysfunctional family life, despite contention that had counsel inquired more into his past and shown that father was alcoholic, jury would have understood traumatic childhood for mitigation purposes; explanation by friends and family of defendant's alcoholism history could have led jury to infer high tolerance level and not to credit 12 beers consumed by defendant before crime as being enough to intoxicate such a hard drinker, and counsel made reasonable, strategic decisions to present most persuasive evidence in mitigation and to cease investigation when results were no longer helpful. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

When there is no showing that interviewing additional witnesses would produce different outcome, post-conviction re-

lief petitioner has failed to show that he was denied right to effective assistance of counsel. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Seventeen-year-old capital murder defendant was procedurally barred by res judicata from arguing in application for post-conviction collateral relief that death penalty was unconstitutional due to lack of particularized finding by circuit court in retaining original jurisdiction over defendant and not transferring him to youth court, as issue had already been challenged on direct appeal, and defendant had merely camouflaged issue by couching claim as ineffective assistance of counsel. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant's appellate counsel did not provide ineffective assistance in failing to raise on appeal issue of whether defendant's proposed instruction on manslaughter was improperly denied; instructions that were given, read as a whole, presented both subject theories of manslaughter and, because law was so thoroughly covered, defendant's appellate attorneys were completely reasonable for not bickering over some obscure jury instruction being denied. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Where defendant had meaningful opportunity to raise issue of ineffective trial counsel on direct appeal and showed neither cause nor actual prejudice, he was procedurally barred by waiver from asserting it through petition for post-conviction relief. *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

Counsel was not ineffective for failing to object to the absence of the word "knowing" in indictment for aggravated assault which charged that defendant wilfully and feloniously caused serious bodily injury. *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

To be entitled to evidentiary hearing on claim of ineffective assistance of counsel, petitioner must allege with specificity and detail that counsel's performance was deficient and that deficient performance so

prejudiced his defense so as to deprive him of a fair trial. *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to

introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The rule that the death of a defendant who has perfected his or her right to appeal does not render the appeal moot applies to petitions for rehearing or when a defendant dies pending appeal from a denial of post-conviction relief; however, if a defendant dies pending application to the Supreme Court for leave to proceed in trial court on post-conviction relief grounds, the application will be deemed moot and the conviction will remain intact. *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether



he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A defendant's complaint sufficiently stated a claim for post-conviction relief on the ground that his guilty plea was involuntary, and therefore his complaint should not have been dismissed on its face, where the defendant alleged that his attorney told him that he would receive a sentence of less than 12 years if he entered a guilty plea, and the defendant entered a plea of guilty whereupon he was sentenced to 16 years' imprisonment. Although a mere expectation or hope of a lesser sentence than might be meted out after conviction upon a trial by jury will generally not be sufficient to entitle a defendant to relief in such a case, the assurance of a 12-year cap on his sentence constituted a "firm representation" rather than a "mere expectation" of such a lesser sentence, and therefore provided a basis for relief. *Myers v. State*, 583 So. 2d 174 (Miss. 1991).

A capital murder defendant was not denied effective assistance of counsel on direct appeal by his attorney's alleged

failure to bring to the Supreme Court's attention a plea bargain with an accomplice who testified as a witness, where the Supreme Court was well aware that the accomplice had been permitted to plead guilty to manslaughter and that he had been sentenced to 15 years' imprisonment but had served only 2½ years. *Culberson v. State*, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney gave the prosecution permission to interview the defense witnesses while allowing the prosecution to disallow the defendant from taking a deposition of the victim, since the defendant had no right to such a pre-trial deposition and the trial court lacked the authority to require the victim to talk with defense counsel where the victim was unwilling to do so; the defendant's counsel could not be faulted as ineffective for failing to secure that which the defendant had no right to obtain. *Jordan v. State*, 577 So. 2d 368 (Miss. 1990).

A defense attorney's failure to object when a prosecution witness, who was a nurse, was sent into the jury room to attend to a juror who had become ill, did not constitute ineffective assistance of counsel where no allegation or facts were presented as to how the attorney's failure to object resulted in any significant prejudice to the defendant at his trial. *Jordan v. State*, 577 So. 2d 368 (Miss. 1990).

A defendant was not denied his right to effective assistance of counsel merely because his attorney failed to procure a preliminary hearing where no allegation or facts were presented as to the way in which this matter operated to the defendant's prejudice. *Jordan v. State*, 577 So. 2d 368 (Miss. 1990).

A defendant's post-conviction claim of ineffective assistance of counsel, which was based on allegations that the defendant's counsel failed to object to allegedly defective indictments and erroneously advised the defendant to plead guilty, was properly dismissed without the benefit of an evidentiary hearing because it was manifestly without merit where the defendant failed to allege with the "specificity



and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense, the facts alleged and the brief submitted were not supported by any affidavits other than his own, the indictments were not defective and therefore the defendant's counsel could not be faulted for failing to challenge their validity, and the defendant failed to identify the "deficient and erroneous advice" of his counsel that allegedly resulted in his pleas of guilty. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

A petitioner was not entitled to have his guilty pleas set aside on the grounds that they were made involuntarily and without effective assistance of counsel where the petitioner was a college graduate, prior to entering a guilty plea he had a long-standing knowledge of the charges and a notice and understanding of the severity of the charges and should have had an understanding of the severity of the potential punishment, he had the opportunity to consult with his attorney or to consult with any other attorney concerning the charges pending against him, he sought counselling and underwent therapy at a mental health center and had contact with other institutions all of which should have assisted him in intelligently weighing the consequences of the charges and of a plea of guilty, and at the time of entering his plea of guilty, he was specifically asked whether he was satisfied with his attorney's services and responded "very much so"; the petitioner apparently knowingly, willfully, freely, and voluntarily chose to abort his trial by announcing in open court that he desired to change his plea from not guilty to guilty and at that instance raised no complaint about counsel or about the judicial proceedings, and therefore his petition for post-conviction relief would be dismissed. *Schmitt v. State*, 560 So. 2d 148 (Miss. 1990). But see *Weatherspoon v. State*, 736 So. 2d 419 (Miss. Ct. App. 1999).

Defense counsel's failure to inform state trial court of sentencing alternatives under State Youth Court Law (Miss Code Anno §§ 43-21-101 et seq.) for minor convicted of murder, constituted ineffective assistance of counsel requiring grant of

writ of habeas corpus for inmate's release unless inmate is resentenced, however, new trial to remedy trial counsel's failure to inform trial court of sentencing alternatives is not required. *Burley v. Cabana*, 818 F.2d 414 (5th Cir. 1987).

## 6. —Conflict of interest.

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The right to effective assistance of counsel encompasses 2 broad principals—minimum competence and loyal assistance. The right to conflict free counsel is attendant to the Sixth Amendment right to effective assistance of counsel. It is incumbent upon courts which confront and which are alerted to possible conflicts of interest to take the necessary steps to ascertain whether the conflict warrants separate counsel. Thus, where a defense attorney represented 2 codefendants during the sentencing phase of the judicial proceedings and it could easily have been anticipated that the attorney would argue that the actions of one of the codefendants should not be attributed to the other or that the attorney would opt to not say or do anything in litigation for fear that to do so would characterize one codefendant as being more culpable than the other, the failure of the trial court to disclose to the codefendants the potential dangers of joint representation by counsel laboring under a conflict resulted in a violation of the right to effective assistance of counsel, and therefore a new sentencing hearing was warranted. *Armstrong v. State*, 573 So. 2d 1329 (Miss. 1990).

Motion of petitioner under death sentence to vacate or set aside judgment and sentence on the ground of ineffective assistance of trial counsel due to fact that same counsel represented petitioner and 2 others would be denied in absence of showing of any instance where any of the 3 were in any adversarial or conflicting position during or as a result of the joint representation during either the guilt or sentencing phase of the trial. *Stringer v.*

State, 485 So. 2d 274 (Miss. 1986), cert. denied, 479 U.S. 922, 107 S. Ct. 327, 93 L. Ed. 2d 300 (1986).

### **6.5. Newly discovered evidence.**

Appellate court affirmed the denial of an inmate's petition for post-conviction relief as evidence that the inmate discovered that his appointed counsel was suspended from the practice of law a year after he was representing him did not warrant an exception to the time bar pursuant to Miss. Code Ann. § 99-39-5(2). *Gatlin v. State*, 932 So. 2d 67 (Miss. Ct. App. 2006).

Relief under Miss. Code Ann. § 99-39-5(2) and Miss. Code Ann. § 99-39-23(6) was properly denied because the exceptions to the procedural bars did not apply where a prisoner's failure to understand the law regarding jury instructions or effective assistance of counsel, until he later conducted research regarding his case, did not constitute newly discovered evidence and did not invoke the plain error rule. *Pickle v. State*, 942 So. 2d 243 (Miss. Ct. App. 2006).

Inmate's motions for post-conviction relief were denied as successive and time barred because the inmate failed to show that any exceptions applied; a letter from a district attorney recommending a denial of parole did not constitute newly discovered evidence because it did not exist at the time of trial. *Garlotte v. State*, 915 So. 2d 460 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2005).

Court properly dismissed petitioner's motion to vacate and set aside his conviction and sentence as time barred pursuant to Miss. Code Ann. § 99-39-5(2) because petitioner's guilty plea to two counts of armed robbery negated any notion that there was some undiscovered evidence that could prove his innocence. *Chancy v. State*, 938 So. 2d 267 (Miss. Ct. App. 2005).

Where defendant's post-conviction motion was successive under Miss. Code Ann. § 99-39-23(6) and was not preserved by a proper objection, the alleged mistake was clearly discoverable at sentencing as required by Miss. Code Ann. § 99-39-5(2), and the appeal was not properly supported because no part of Fed. R. Crim. P. 11 states what defendant claimed on ap-

peal; the motion was properly dismissed. *McGriggs v. State*, 877 So. 2d 447 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's claim in a motion for post-conviction relief that he was entitled to a new trial of two counts of robbery to which defendant had pleaded guilty based on newly discovered evidence could not be considered as the claim was being raised for the first time on appeal; defendant could, however raise the issue in a separate proceeding. *Donnelly v. State*, 841 So. 2d 207 (Miss. Ct. App. 2003).

Any new evidence presented by a defendant in a post-conviction relief petition would almost certainly require a different result in the conviction or sentence. *Ouzts v. State*, 817 So. 2d 585 (Miss. Ct. App. 2001).

A defendant who pled guilty to felony escape was not entitled to relief on the basis of newly discovered evidence which allegedly showed that he was in jail on the date of his alleged escape; such evidence was actually consistent with guilt because, in order to escape from jail on a specific date, an individual would necessarily have to be in the jail on that same date. *Henley v. State*, 749 So. 2d 246 (Miss. Ct. App. 1999).

### **7. Claim that person other than defendant committed crime.**

A defendant was not entitled to an evidentiary hearing on his motion for post-conviction relief where the petition was time barred under subsection (2) of this section, and the defendant's allegations were insufficient to require the trial court to grant an evidentiary hearing where his claims were based primarily on the allegation that a witness was available to testify that the crime with which the defendant was charged had been committed by another person and that the witness was not available to make an affidavit because the defendant was incarcerated. *Campbell v. State*, 611 So. 2d 209 (Miss. 1992).

### **7.5. Unlawfully held in custody.**

Trial court properly dismissed inmate's petition for post-conviction relief. The inmate's burglary sentence expired in 1995; therefore, he was not in custody under a



sentence imposed by a court of record of the State of Mississippi which is a prerequisite to maintaining a motion for post-conviction relief. *Rice v. State*, 910 So. 2d 1163 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Where defendant was sentenced concurrently in Mississippi for two felony sentences concurrent with his Texas conviction, his being paroled in Texas did not entitle him to release from confinement under his Mississippi convictions. *Smith v. State*, 853 So. 2d 1277 (Miss. Ct. App. 2003).

The appellant could legitimately be said to be "in custody" for purposes of subsection (1)(g), even though he was not currently being held in Mississippi due to his incarceration elsewhere, since, but for this incarceration, he would have been subject to imprisonment in Mississippi because the state had a "hold" on him and he was going to be released to Mississippi immediately following his out-of-state incarceration. *Unruh v. Puckett*, 716 So. 2d 636 (Miss. 1998).

### 7.8. Videotapes.

In a wrongful death case, a court did not abuse its discretion by admitting photographs of the decedent and two "day in the life" videos where the photographs were relevant to show plaintiff's loss, and the videos were relevant to proving plaintiff's case. The footage showed the type of person the decedent was prior to his injuries, the type of care decedent required subsequently, and his drastically diminished capacity to interact with his wife, child and family, among other things. *Eckman v. Moore*, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003).

### 8. Timeliness.

Motion for post-conviction relief based on an allegation that defendant was entitled to an administrative hearing for the loss of earned time and trusty time after an escape conviction was time barred under Miss. Code Ann. § 99-39-5(2) since the motion was filed more than five years after the limitations period had expired. *Golden v. Epps*, — So. 2d —, 2007 Miss. App. LEXIS 392 (Miss. Ct. App. June 5, 2007).

Defendant claimed that his indictment was defective because it did not specify the felony underlying the burglary, and as such the indictment could not support a finding of capital murder, but the state countered that under Miss. Code Ann. § 99-39-5(2) defendant had three years from 1997 to challenge his conviction under the Mississippi Post-Conviction Collateral Relief Act; defendant was convicted in 1980 but he was resentenced in 1998 and did not raise that issue to the trial court or the supreme court, and thus defendant was barred from raising the matter by virtue of the time bar in Miss. Code Ann. § 99-39-5(2). *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

Issues of an involuntary guilty plea, ineffective assistance of counsel, a defective and improper indictment, and misconduct on the part of the state officials that were presented by an inmate in a motion for post-conviction relief, were procedurally barred because the inmate waited more than six years after the inmate was convicted to file the motion; furthermore, the trial court found that none of the exceptions to the three-year statute of limitations of Miss. Code Ann. § 99-39-5(2) were applicable, and thus the inmate was not entitled to post-conviction relief. *Davis v. State*, — So. 2d —, 2007 Miss. App. LEXIS 367 (Miss. Ct. App. May 29, 2007).

Defendant's second motion for post-conviction relief was properly denied because it was time-barred under Miss. Code Ann. § 99-39-5(2), and none of the enumerated statutory exceptions to the time limitation applied; defendant's judgment of conviction was entered on February 7, 2003, but the second motion for post-conviction relief was not filed until February 27, 2006. *Barnes v. State*, — So. 2d —, 2007 Miss. App. LEXIS 282 (Miss. Ct. App. May 1, 2007).

Motion for post-conviction relief was denied in case challenging the legality of a life sentence imposed for two counts of robbery with a deadly weapon because this was a permissible sentence where a jury did not impose the death penalty; the motion was timely, despite being filed about 30 years after the conviction, be-



cause an illegal sentence could have been challenged at any time. *McLeod v. State*, 952 So. 2d 302 (Miss. Ct. App. 2007).

Where appellant's motion for post-conviction relief was filed outside the three-year statute of limitations imposed by Miss. Code Ann. § 99-39-5, the motion was time-barred; appellant's claims of ineffective assistance of counsel and a defective indictment were not sufficient to overcome the bar imposed by the period of limitation. *Barnes v. State*, 949 So. 2d 879 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied where he had no entitlement to a jury trial on the issue of whether or not he qualified for enhanced punishment under the habitual offender statute; defendant failed to prove that an intervening decision of the U.S. Supreme Court or the Mississippi Supreme Court excepted the procedural time bar of his claim pursuant to Miss. Code Ann. § 99-39-5(2). *Smith v. State*, — So. 2d —, 2007 Miss. App. LEXIS 39 (Miss. Ct. App. Feb. 6, 2007).

Trial court properly denied defendant's motion for post-conviction relief on the ground that it was time-barred where the motion for relief was filed almost four years after he pled guilty to armed robbery; defendant met none of the exceptions to the three-year time limitation in Miss. Code Ann. § 99-39-5(2). *Bailey v. State*, 953 So. 2d 1132 (Miss. Ct. App. 2007).

Where defendant entered a plea of guilty to murder as a habitual offender in 1980, he was sentenced to serve a term of life in custody. The court treated his 2004 motion to vacate judgment and sentence as a motion for post-conviction relief, and dismissed it as barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). *Padgett v. State*, 938 So. 2d 876 (Miss. Ct. App. 2006).

Motion for post-conviction relief was heard, despite the fact that it was filed after the limitations period in Miss. Code Ann. § 99-39-5(2), where the state did not object, and defendant may have delivered his documents to prison officials in a timely manner since the petition was only three days late. *Rhone v. State*, — So. 2d —, 2006 Miss. App. LEXIS 863 (Miss. Ct. App. Nov. 21, 2006).

Motion for post-conviction relief filed more than seven years after the entry of a guilty plea to drug charges was properly denied as being time barred under Miss. Code Ann. § 99-39-5(2); moreover, it was also a successive petition under Miss. Code Ann. § 99-39-27(9) where relief had been denied once before, despite the style of the motion. *King v. State*, 943 So. 2d 743 (Miss. Ct. App. 2006).

Where appellant was convicted of selling marijuana in 1983, his probation was revoked and he was ordered to serve an eight-year sentence consecutive to any previous sentence; where he filed for post-conviction relief in 2005, alleging the ineffective assistance of counsel in connection with the 1983 conviction, his claim was barred by the statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). *Sanders v. State*, 942 So. 2d 298 (Miss. Ct. App. 2006).

Where petitioner was sentenced to 31 years in prison upon his plea of guilty to two counts of armed robbery, affidavits indicating that he thought he would receive a lesser sentence did not contain newly discovered evidence that could provide an exception to the three-year time limit for post-conviction relief under Miss. Code Ann. § 99-39-5(2). *Chancy v. State*, 938 So. 2d 251 (Miss. 2006).

Order summarily dismissing petitioner's motion for post-conviction relief was upheld where his motion did not have any merit or meet any criteria for exception to the three-year time bar. *Stewart v. State*, 938 So. 2d 344 (Miss. Ct. App. 2006).

Defendant's petition for post-conviction relief was clearly a successive writ, Miss. Code Ann. § 99-39-27(9), and was time-barred under Miss. Code Ann. § 99-39-5(2). *Roland v. State*, 939 So. 2d 810 (Miss. Ct. App. 2006).

Dismissal of the inmate's motion for post-conviction relief was proper because Miss. Code Ann. § 99-39-5(2) began to run from the date of the judgment of conviction, which was entered at his sentencing hearing on June 12, 2000; therefore, when he filed his motion for post-conviction relief on February 11, 2004, it was time-barred. *Smith v. State*, 933 So. 2d 1008 (Miss. Ct. App. 2006).

Although a trial court erred when it denied an inmate's petition for post-con-

viction relief on the grounds that it was barred by the three-year statute of limitations in Miss. Code Ann. § 99-39-5, the appellate court affirmed the denial on other grounds. *Steen v. State*, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Where appellant was sentenced to consecutive four-year sentences for armed robbery and attempted armed robbery in May 2000, the court did not have authority to grant his motion for a reduction of sentence filed in October 2004; even if the court treated his motion as a petition for post-conviction relief, it would be barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). *Walters v. State*, 933 So. 2d 313 (Miss. Ct. App. 2006).

Appellant failed to file his motion for post-conviction relief within three years of his guilty plea to possession of marijuana with intent to sell; although appellant cited precedent in support of his argument for escaping the procedural bar, they were inapplicable to his situation. *Dozier v. State*, 952 So. 2d 259 (Miss. Ct. App. 2006).

Where appellant pled guilty to armed robbery and aggravated assault on May 13, 1999, appellant's second motion for post-conviction relief filed on January 14, 2005, was untimely. *Ellis v. State*, 952 So. 2d 251 (Miss. Ct. App. 2006).

It was error for the trial court to conclude that the inmate's application for post-conviction relief was barred by the three-year limitations period set forth in Miss. Code Ann. § 99-39-5 because the motion was made within three years after the entry of the judgment of conviction. *Melton v. State*, 930 So. 2d 452 (Miss. Ct. App. 2006).

Because defendant did not receive a suspended sentence, his sentence was not illegal under Miss. Code Ann. § 47-7-33(1) (Rev. 2004), and therefore his petition for post-conviction relief was properly dismissed as untimely, as it was not filed until March 2005; under Miss. Code Ann. § 99-39-5(2), defendant only had until June 5, 2003, to file his motion for post-conviction relief, and two years' incarceration plus one year of supervision did not exceed 15 years, the maximum sentence for uttering a forgery. *King v. State*, 929 So. 2d 373 (Miss. Ct. App. 2006).

Order dismissing defendant's second motion for post-conviction relief was upheld where it was filed after the expiration of the limitations period in Miss. Code Ann. § 99-39-5(2). No statutory exception was applicable; there was no intervening decision of either the Mississippi Supreme Court or the United States Supreme Court that would have a bearing on the outcome of the case, there was no newly discovered evidence, nor did he claim that his sentence had expired or that his probation, parole, or conditional release had been unlawfully revoked. *Gaston v. State*, 922 So. 2d 841 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's petition as Miss. Code Ann. § 99-39-5(2) required that the petition be filed within 3 years of his conviction, and the inmate's petition was time-barred. *Chatman v. State*, 936 So. 2d 375 (Miss. Ct. App. 2006), cert. denied, 936 So. 2d 367 (Miss. 2006).

Appellate court affirmed the denial of the inmate's motion for post-conviction relief as the inmate filed the motion more than three years after his conviction and did not assert any of the tolling provisions in Miss. Code Ann. § 99-39-5(2). *Little v. State*, 918 So. 2d 97 (Miss. Ct. App. 2006).

Petitioner was properly denied post-conviction relief after he pled guilty to manslaughter by culpable negligence because the petition was time barred under Miss. Code Ann. § 99-39-5(2); the petition was filed more than six years after the guilty plea was entered. Petitioner failed to present any intervening decision from the Supreme Court of either the United States or the State of Mississippi that would have actually adversely affected the outcome of his conviction or sentence. *Oaks v. State*, 912 So. 2d 1075 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of the inmate's motion for post-conviction relief due to ineffective assistance of counsel because the motion was filed four years after the inmate entered his guilty pleas, and therefore, the motion was procedurally barred by the three-year statute of limitations as set forth in Miss. Code Ann. § 99-39-5(1). *Henderson v. State*, 912 So. 2d 1099 (Miss. Ct. App. 2005).

Inmate's 28 U.S.C.S. § 2254 petition was dismissed without prejudice, as he



did not exhaust state remedies. He stated he was convicted on March 4, 2005, and sentenced on May 13, 2005, and was currently pursuing relief in Mississippi Supreme Court; he had three years after the date his direct appeal was ruled upon by the supreme court to file a motion under the statute, Miss. Code Ann. § 99-39-5(2). *Wallace v. McLendon*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37156 (S.D. Miss. July 8, 2005).

Trial court did not err by treating an inmate's writ of habeas corpus as a petition for post-conviction relief as the trial court lacked jurisdiction to hear the writ under Miss. Code Ann. § 11-43-1, and -9, and the petition was also barred as a petition for post-conviction relief under Miss. Code Ann. § 99-39-5(2). *Moore v. Miss. Dep't of Corr.*, 936 So. 2d 941 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of defendant's motion for post-conviction relief as it was filed more than three years after defendant's conviction. *Laushaw v. State*, 926 So. 2d 240 (Miss. Ct. App. 2005).

Mississippi Supreme Court holds that the three-year statute of limitations in Miss. Code Ann. § 99-39-5(2) may be waived when a fundamental constitutional right is implicated. *Chancy v. State*, 938 So. 2d 267 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where the petition was untimely and none of the exceptions to Miss. Code Ann. § 99-39-5 applied. *McBride v. State*, 914 So. 2d 260 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Petitioner's notice of appeal in writ of state habeas corpus was properly denied as a successive writ pursuant to Miss. Code Ann. § 99-39-27(9) because petitioner had previously filed an application for post-conviction relief, which was denied. The notice of appeal in writ of state habeas corpus was also time barred under Miss. Code Ann. § 99-39-5(2) because it was filed more than three years after his guilty plea. *Austin v. State*, 914 So. 2d 1281 (Miss. Ct. App. 2005).

Appellate court affirmed the dismissal of the inmate's motion for post-conviction relief as the motion time barred under

Miss. Code Ann. § 99-39-5 as it was not filed within three years of the statute being enacted. *Hill v. State*, 914 So. 2d 293 (Miss. Ct. App. 2005).

Dismissal of an inmate's motion for post-conviction relief was affirmed as the inmate was convicted in 1988 and did not file the motion until 16 years later; thus, the motion was time-barred under Miss. Code Ann. § 99-39-5(2). *Durant v. State*, 914 So. 2d 295 (Miss. Ct. App. 2005).

Denial of the inmate's second motion for post-conviction relief was appropriate pursuant to Miss. Code Ann. § 99-39-5(2) because the motion was not made within three years after entry of the judgment of conviction. Additionally, his arguments did not fall within the exceptions for a procedural time bar. *Freshwater v. State*, 914 So. 2d 328 (Miss. Ct. App. 2005).

Defendant's appeal from the denial of his motion to correct the record regarding his 1975 aggravated assault conviction was procedurally barred under Miss. Code Ann. § 99-39-5 and dismissed for lack of jurisdiction as it was filed 28 years after the conviction, and defendant had no standing as he was not in custody for the 1975 sentence. *Smith v. State*, 918 So. 2d 850 (Miss. Ct. App. 2005).

Trial court properly denied petitioner's request for post-conviction relief because petitioner filed the request more than three years from the conviction and there was no fundamental right involved, because the petitioner only had a right to challenge the illegal sentence while he was held in custody on that sentence. *Gates v. State*, 904 So. 2d 216 (Miss. Ct. App. 2005).

Under Miss. Code Ann. § 99-39-5(2), a motion for post-conviction relief is made in the case of a guilty plea within three years after entry of the judgment of conviction. Hence, the court properly denied petitioner's motion for post-conviction relief where it was filed almost 19 years after his conviction; petitioner was no longer serving the sentence of which he complained. *Morris v. State*, 918 So. 2d 807 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2006).

Where appellant's motion for post-conviction relief was filed approximately nine years after his armed robbery conviction,



it was barred by the three-year limitation period. *Weathersby v. State*, 919 So. 2d 262 (Miss. Ct. App. 2005).

Court properly denied defendant's motion for post-conviction relief, which was filed more than five years after judgment on his guilty plea, because his motion was not excepted from the time bar pursuant Miss. Code Ann. § 99-39-5(2) due to the fact that his sentence was not deferred, suspended, or waived. The trial court correctly determined that the sentencing order and plea proceeding made clear that defendant's failure to complete the Intensive Supervision Program/House Arrest Program would result in his being placed in prison to serve the remainder of his 20-year sentence. *McBride v. State*, — So. 2d —, 2005 Miss. App. LEXIS 314 (Miss. Ct. App. May 10, 2005).

Defendant's motion for post-conviction relief complaining that his 35-year enhanced sentence for selling cocaine was excessive was properly denied as being time-barred under Miss. Code Ann. § 99-39-5(2) as it was filed well in excess of three years after the judgment of conviction. *McDougle v. State*, 918 So. 2d 768 (Miss. Ct. App. 2005).

Facts that defendant presented did not establish that he was actually innocent of murder and said claim was without merit, and his claims of double jeopardy, that his guilty plea was involuntary, and that he received ineffective assistance of counsel, were properly dismissed as time barred as they did not affect his fundamental rights. Defendant's claim that the Mississippi state courts had no jurisdiction to convict him based on his argument that his guilty plea was involuntary and plea counsel was ineffective was also time-barred as the latter claims were little more than an attempt to re-argue that his guilty plea was involuntary and that he did not receive effective assistance of counsel. *Trotter v. State*, 907 So. 2d 397 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Where the inmate's guilty plea was filed on November 29, 1999, and his third motion for post-conviction relief was filed more than three years later, on August 19, 2003, the court properly dismissed the motion as time-barred. The inmate cited

to no intervening cases or newly discovered evidence, not reasonably discoverable at the time of trial, which would except his claim from the three-year statute of limitations. *Brown v. State*, 907 So. 2d 979 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Petitioner's second request for post-conviction relief filed ten years after he pled guilty to charges of murder and arson was properly denied, because he failed to establish any exception to the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). There were also no claims that could not have been included in the earlier request for post-conviction relief. *Rochell v. State*, 913 So. 2d 993 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 1081, 163 L. Ed. 2d 899 (2006).

Defendant's motion for post-conviction relief was time-barred under Miss. Code Ann. § 99-39-5(2) as it was filed well beyond the three year statutory period during which such motions may be filed. *Cook v. State*, 910 So. 2d 745 (Miss. Ct. App. 2005).

Trial court properly held that appellant's motion for post-conviction relief was procedurally barred by Miss. Code Ann. § 99-39-5, because it was not filed within three years of his guilty plea to burglary. *Rice v. State*, 910 So. 2d 1163 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Where an inmate entered his guilty plea prior to the enactment of Miss. Code Ann. § 99-39-5, he had three years from the date of its enactment to file his petition for post-conviction relief challenging the validity of his prior burglary convictions which were used to enhance the sentence for a later cocaine conviction. Because he failed to file his petition within that time, it was time-barred. *Phillips v. State*, 913 So. 2d 330 (Miss. Ct. App. 2005).

When the former inmate filed his motion for post-conviction relief on January 15, 2003, he had already completed serving the five-year perjury sentence given him in 1988 and, thus, he was not even eligible to file a motion for post-conviction relief under Miss. Code Ann. § 99-39-5(a); but even if he were not precluded by

§ 99-39-5(1) from filing a motion for post conviction relief, his motion was properly dismissed because his case did not fall into one of the exceptions to the three-year limitation set out in Miss. Code Ann. § 99-39-5(2). Additionally, Miss. Code Ann. § 99-39-5(2) barred claims based on involuntariness of guilty plea and ineffective assistance of counsel; therefore, the circuit court did not err in dismissing the former inmate's motion for post-conviction relief which was filed more than 14 years after he entered his plea of guilty. *Burrell v. State*, 909 So. 2d 1125 (Miss. Ct. App. 2005).

Inmate's petition for post-conviction relief was denied as time barred because the motion was filed almost 13 years after the conviction, and no exceptions applied. *Zambrella v. State*, 906 So. 2d 844 (Miss. Ct. App. 2004).

Defendant's conviction was time-barred under Miss. Code Ann. § 99-39-5(2) where the circuit court entered defendant's conviction on April 26, 1999, the date of his plea, and to comply with the statute, defendant was required to file his post-conviction pleadings within three years after that date; the petition from which defendant appealed, however, was not filed until August 29, 2003, and he clearly failed to file within the requisite three years, so his petition was also precluded by the statutory time bar. *Kemp v. State*, 904 So. 2d 1162 (Miss. Ct. App. 2004).

Defendant's motion was time-barred as it did not fall within the three-year time limitation of Miss. Code Ann. § 99-39-5(2); defendant filed his second motion on August 29, 2003, and his guilty plea was filed on February 23, 1999, so that his second motion for post-conviction relief was time-barred. *Clark v. State*, 898 So. 2d 687 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Order on defendant's guilty plea and enhanced sentence was entered in 1985 and his post-conviction relief petition was not filed until December 2000. While it was true that he filed a petition for writ of certiorari in 1986, he was attempting to appeal his conviction for kidnapping, not his conviction for escape (after his kidnapping conviction), or enhanced sentence; thus, his claims pertaining to the entry of

the guilty plea on the charge of escape and the enhanced sentence as a habitual offender were time barred. *Hires v. State*, 882 So. 2d 225 (Miss. 2004).

Denial of the inmate's petition for post-conviction relief was proper pursuant to Miss. Code Ann. § 99-39-5(2) where the petition was time barred and where the inmate failed to show that he was denied a fundamental right or that his sentence was illegal because he was sentenced as an habitual offender without receiving the mandatory bifurcated hearing required by Miss. Unif. Cir. & County Ct. Prac. R. 11.03. *Hudson v. State*, 891 So. 2d 260 (Miss. Ct. App. 2004).

Defendant's appeal was a successive petition for an out-of-time appeal and he was procedurally barred from prosecuting his appeal. Also, the trial court had properly denied defendant's prior three motions for post-conviction relief because defendant failed to assert his motions within the three-year statutory time period provided under Miss. Code Ann. § 99-39-5(2) or to establish that his claims fell within one of its three recognized exceptions. *Bass v. State*, 888 So. 2d 1187 (Miss. Ct. App. 2004).

As an inmate filed his petition for post-conviction relief more than three years after he entered his guilty plea, the inmate's petition was time barred. *Farris v. State*, 881 So. 2d 392 (Miss. Ct. App. 2004).

Defendants argued that the statutory exceptions to the three-year statute of limitations as set forth in Miss. Code Ann. § 99-39-5 (2) applied, as this particular statute pertained to the time limit within which to file a motion for post-conviction relief and also any exceptions to the time bar, and in cases where a defendant had pled guilty, a motion for relief had to be filed within three years after the entry of the judgment of conviction; defendants pled guilty on January 11, 1996, and filed their motions for relief on March 31, 2003, such that the motions were clearly time-barred and none of the exceptions were applicable, and the time bar included a petitioner's post-conviction relief claims based on involuntariness of guilty pleas and ineffective assistance of counsel. *Belmer v. State*, 893 So. 2d 250 (Miss. Ct.



App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Appellate court affirmed the denial of the inmate's petition for post-conviction relief; the petition was filed more than three years after sentencing and none of the grounds for relief came within the exception to the three-year period of limitations. *Bryant v. State*, 879 So. 2d 530 (Miss. Ct. App. 2004).

According to Miss. Code Ann. § 99-39-5(2), defendant had three years in which to file his motion for post-conviction relief following his guilty plea to forgery; however, the record indicated that defendant pled guilty to seven counts of forgery on November 4, 1998, such that in order to meet the time requirement set by statute, defendant had to file his motion by November 4, 2001, and because he waited until October 15, 2002, to file his motion for relief, the trial court properly dismissed his motion as time barred. *Alexander v. State*, 879 So. 2d 512 (Miss. Ct. App. 2004).

Inmate's petition for post-conviction relief was properly denied as the petition was not filed within three years of his guilty plea; the inmate could not raise the issue of estoppel on appeal where he had not raised the issue at the trial court level. *Jones v. State*, 878 So. 2d 254 (Miss. Ct. App. 2004).

None of the exceptions to the three-year limitation of Miss. Code Ann. § 99-39-5 were applicable and defendant's petition for post-conviction collateral relief was time barred; defendant's claim of ignorance of the law was not considered newly discovered evidence. *Clark v. State*, 875 So. 2d 1130 (Miss. Ct. App. 2004).

Defendant's involuntary plea argument could not be advanced in the post-conviction relief petition because it was time barred and did not fall within one of the exceptions set forth in Miss. Code Ann. § 99-39-5(2); notwithstanding the time bar, her argument failed because probation was a conditional term that was not part of a prison sentence. *Miller v. State*, 879 So. 2d 1050 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Because a new decision was an intervening decision, even though an inmate's application for post-conviction relief was

time-barred under Miss. Code Ann. § 99-39-5(2), the application was not barred under Miss. Code Ann. § 99-39-27(9) and was eligible to be considered on the merits. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

As inmate's petition for post-conviction relief was filed 8 days before the three-year limitation period expired, the inmate's petition was timely. *Bell v. State*, 879 So. 2d 423 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Petitioner was properly denied post-conviction relief, because his petition was time barred, as it was filed more than 15 years after the statute of limitations had expired, and petitioner failed to put forth any facts to require consideration of his appeal outside the three-year period of limitation. *Truitt v. State*, 878 So. 2d 244 (Miss. Ct. App. 2004).

Appellant's motion for post-conviction relief was properly denied as time-barred, as it was filed more than three years after appellant's guilty plea for burglary and possession of cocaine. *Williams v. State*, 872 So. 2d 711 (Miss. Ct. App. 2004).

Defendant's mere assertion of a constitutional right violation was not sufficient to overcome the time bar of Miss. Code Ann. § 99-39-5. There had to at least appear to be some basis for the truth of the claim, or merit to the claim, before the limitation period would be waived and dismissal avoided pursuant to Miss. Code Ann. § 99-39-11(2). *Stovall v. State*, 873 So. 2d 1056 (Miss. Ct. App. 2004).

Inmate's claim was time barred as it was not filed within three years after entry of the judgment of conviction as required by Miss. Code Ann. § 99-39-5(2) (Supp. 2002). *Bell v. State*, 886 So. 2d 739 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1647, 161 L. Ed. 2d 485 (2005).

Defendant's motion for postconviction relief was untimely where it was filed more than six years after the entry of the judgment of conviction, and there was no evidence that any of the exceptions in Miss. Code Ann. § 99-39-5(2) were applicable; defendant presented no evidence of an intervening decision that would have



affected his conviction, nor did he present evidence of newly discovered evidence, or that his sentence had expired or his probation, parole, or conditional release was unlawfully revoked. *Mason v. State*, 867 So. 2d 1058 (Miss. Ct. App. 2004).

Inmate's motion for postconviction relief was barred as untimely under Miss. Code Ann. § 99-39-5(2) because it was filed more than three years after the judgment of conviction was entered. *Skinner v. State*, 864 So. 2d 298 (Miss. Ct. App. 2003).

Trial court properly denied a prisoner's motion for postconviction relief without an evidentiary hearing under Miss. Code Ann. § 99-39-5(2) because the motion was not filed until more than three years after entry of the judgment of conviction. *Brister v. State*, 858 So. 2d 181 (Miss. Ct. App. 2003).

Defendant's claim that his guilty plea was not knowingly, intelligently, and voluntarily made was the type of claim that the postconviction statute, Miss. Code Ann. § 99-39-5, required be made within three years; raising a claim of ineffective assistance of counsel was not enough by itself to overcome the procedural bar, and defendant's remaining arguments also were required to have been brought within the three-year period. *Austin v. State*, 863 So. 2d 59 (Miss. Ct. App. 2003).

Trial court erred when it dismissed the inmate's motion for post-conviction relief as being untimely where the inmate asserted a claim that, if correct, would suggest that his sentence had at least potentially expired; a claim by a prisoner that his sentence had expired was excluded from the time bar of Miss. Code Ann. § 99-39-5(2). *Stanley v. State*, 850 So. 2d 154 (Miss. Ct. App. 2003).

Petitioner's request for post-conviction relief was properly dismissed by the circuit court, as the relief was not available to the petitioner because he was never incarcerated, and because the petition was untimely. Petitioner was convicted in 1983; he had until 1987 under the new law to file the petition, which he failed to do. *Phillips v. State*, 856 So. 2d 568 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. Ct. App. 2003).

Inmate's post-conviction claim that his counsel was ineffective, filed over five

years after his guilty plea, was procedurally barred pursuant to Miss. Code Ann. § 99-39-5(2), notwithstanding his claim that an ineffective assistance of counsel claim was a fundamental right that was not barred. *Forshee v. State*, 853 So. 2d 136 (Miss. Ct. App. 2003).

Defendant was not entitled to post-conviction relief because the three year time period for filing post-conviction relief petitions had expired under Miss. Code Ann. § 99-39-5(2); defendant, through counsel, did not file his petition for post-conviction relief until three days after his three year deadline and did not argue any exemption excusing delay. *Johnson v. State*, 848 So. 2d 906 (Miss. Ct. App. 2003).

Defendant was time barred from bringing his motion for post-conviction relief 18 years after the initial conviction where defendant did not provide proof that he was still serving the sentence nor did he allege that he was still serving it; unless defendant was being held under the sentence of which he complained, the post-conviction relief statutes provide no remedy. *Elliott v. State*, 858 So. 2d 154 (Miss. Ct. App. 2003).

Because an inmate's post-conviction relief motion was filed well beyond the three year limitations period of Miss. Code Ann. § 99-39-5(2), there were no exceptions that extended this period, and the inmate's pro se status and ignorance of the law alone were insufficient to establish cause, the court found all issues raised by the inmate time barred and procedurally barred; however, without waiving the procedural bar, the court did address the inmate's claim of an unconstitutional sentence. *Gardner v. State*, 848 So. 2d 900 (Miss. Ct. App. 2003).

Because Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act was defendant's exclusive remedy for postconviction relief (PCR), the trial court correctly treated defendant's complaint for declaratory judgment as a petition for PCR; the motion was properly denied as untimely pursuant to Miss. Code Ann. § 99-39-5. *Moore v. State*, 859 So. 2d 1018 (Miss. Ct. App. 2003).

Imposition of partially suspended sentence upon defendant being convicted of

robbery pursuant to a guilty plea was illegal because defendant had a prior felony conviction which rendered defendant ineligible for such a sentence; defendant was not, however, entitled to out-of-time relief from the conviction based upon the illegal sentence because defendant had received the benefit of the illegal sentence and did not challenge the illegal sentence until the conviction was used to enhance defendant's sentence in a subsequent robbery case. *Edwards v. State*, 839 So. 2d 578 (Miss. Ct. App. 2003).

Defendant's petition seeking postconviction relief from a conviction of manslaughter and aggravated assault entered upon defendant's guilty pleas was barred under either Miss. Code Ann. § 99-39-23 in a successive petition or under Miss. Code Ann. § 99-39-5 because the petition was not filed within three years of the conviction. *Green v. State*, 839 So. 2d 573 (Miss. Ct. App. 2003).

Trial court properly dismissed defendant's petition for postconviction relief relating to a conviction that became final in 1985 because the action was barred by the three-year limitation period on such claims set forth in Miss. Code Ann. § 99-39-5(2) of the Mississippi Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 et seq.; defendant's claim of constitutional based on ineffective assistance of counsel was not included within the four exceptions to the time limit set forth in the statute. *Singleton v. State*, 840 So. 2d 815 (Miss. Ct. App. 2003).

Defendant could not avoid the three-year limitation on the filing of a petition for postconviction relief set forth in Miss. Code Ann. § 99-39-5(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-27, or the parallel rule applicable to convictions that became final prior to the effective date of the statute in 1984, by titling a petition as a petition for habeas corpus relief; defendant's challenge to a rape conviction entered in 1976 was properly dismissed as time-barred. *Edmond v. State*, 845 So. 2d 701 (Miss. Ct. App. 2003).

Defendant's petition for postconviction relief based upon an allegation that defendant was denied his Sixth Amendment

right to counsel at a probation revocation proceeding was barred where the petition was not brought within three years of the judgment; defendant's claim did not fall into any exception to the bar because defendant did not have an absolute right to counsel during a revocation hearing. *Watts v. State*, 840 So. 2d 754 (Miss. Ct. App. 2003).

Where defendants' motions for reconsideration of their sentences was filed outside the three-year statute of limitations of Miss. Code Ann. § 99-39-5, defendants' motion was time barred. *Houston v. State*, 840 So. 2d 818 (Miss. Ct. App. 2003).

Defendant's motion for postconviction relief was filed well beyond the three-year limitation period and there were no exceptions that would extend the period. *Hires v. State*, 856 So. 2d 438 (Miss. Ct. App. 2003).

In a capital murder case, defendant was granted an extension of time to complete and file his application for leave to seek postconviction relief as he was unable to timely file the application due to circumstances beyond his control; defendant's former attorney's actions frustrated his efforts through new counsel to pursue the postconviction process. *Puckett v. State*, 834 So. 2d 676 (Miss. 2002).

Defendant's motion for postconviction relief from a 1980 conviction for assault on a law enforcement official was not time-barred as defendant claimed that the trial court had committed error in not properly advising defendant before accepting defendant's guilty plea and in not ensuring that defendant's right to conflict free counsel was protected and those claims involved defendant's fundamental rights; alleged errors were, however, without merit. *Blansett v. State*, 841 So. 2d 165 (Miss. Ct. App. 2002).

Defendant failed to demonstrate that his motion for postconviction collateral relief fell within one of the enumerated statutory exceptions to the three-year statute of limitations, that his claim was viable, or that a waiver should have been applied by virtue of the implication of a fundamental constitutional right. *McGleachie v. State*, 840 So. 2d 108 (Miss. Ct. App. 2002), cert. denied, 840 So. 2d 716 (Miss. 2003).



In capital case, due process considerations required equitable tolling of the statute of limitations, because petitioner's former attorney's actions affirmatively frustrated his efforts through new counsel to pursue the postconviction process. *Puckett v. State*, — So. 2d —, 2002 Miss. LEXIS 267 (Miss. Aug. 29, 2002).

Defendant's motion for postconviction relief on the grounds that the trial court had imposed an illegal sentence, filed 10 years after defendant had pleaded guilty to a drug-related charge and had received a largely suspended sentence, was time-barred under Miss. Code Ann. § 99-39-5(2); the fact that defendant had reoffended and had been returned to prison did not make an improperly lenient sentence illegal. *Adams v. State*, 841 So. 2d 151 (Miss. Ct. App. 2002), cert. denied, 840 So. 2d 716 (Miss. 2003).

Defendant's petition for postconviction relief from his conviction for aggravated assault based on defendant's guilty plea was timely because it was filed within three years of defendant's sentencing following his apprehension on a bench warrant for failure to appear for sentencing; defendant's claims that his plea was involuntary and that he was denied effective assistance of counsel were, however, without merit. *Taylor v. State*, 823 So. 2d 1233 (Miss. Ct. App. 2002).

Mississippi postconviction statutes are available only to those serving a sentence for the crime for which they were convicted by a Mississippi court of record. Therefore, postconviction relief was properly denied, pursuant to Miss. Code Ann. § 99-39-5(1), where the petition for relief was filed after defendant's seven-year total sentence from a Mississippi trial court had expired. *Shaw v. State*, 803 So. 2d 1282 (Miss. Ct. App. 2002).

Defendant's motion for postconviction relief was time-barred under Miss. Code Ann. § 99-39-5(2) for being outside the three-year statute of limitations, as defendant's conviction entry was filed in January 1995 and the motion was filed in October 1998. *Jones v. State*, 805 So. 2d 610 (Miss. Ct. App. 2002).

The Mississippi Uniform Post-Conviction Collateral Relief Act is the legal vehicle for judicial redress of claims by prison-

ers upon whom the trial court was without jurisdiction to impose sentence. *Norwood v. State*, — So. 2d —, 2001 Miss. App. LEXIS 489 (Miss. Ct. App. Nov. 27, 2001).

Defendant's failure to file his petition for postconviction relief within three years of the date he was convicted for sale of cocaine meant that the trial court did not err in denying that petition without considering its merits as Miss. Code Ann. § 99-39-5(2) required that petition be filed within that time frame, defendant filed his petition more than a year beyond that time frame, and no exceptions were applicable to his late filing. *Kelly v. State*, 797 So. 2d 1003 (Miss. 2001).

No fundamental right was violated and, therefore, the three-year statute of limitation acted as a bar to the petitioner's claim, notwithstanding the petitioner's assertion that his fundamental rights were violated because the person named as the victim in the indictment was the wrong person, since the indictment was amended and a change of the name of the victim in an indictment goes to form, rather than substance. *Ivy v. State*, 792 So. 2d 319 (Miss. Ct. App. 2001).

A petitioner's original motion was pending and viable when his amended motion for postconviction relief was filed and, therefore, he was entitled to a decision on that motion where the original motion was filed in a timely manner, notwithstanding that the trial court found that the petitioner failed to timely pursue his petition, resulting in its abandonment, since there was no notice of any intent to act upon the original motion given by the trial court and there was no notice of any action taken upon the original motion given by the trial court. *Laushaw v. State*, 791 So. 2d 854 (Miss. Ct. App. 2001).

Defendant in federal prison was barred from filing petition for postconviction relief from guilty plea to business burglary 11 years after entry of judgment on defendant's guilty plea as there was no evidence that any exception to the three-year statute of limitation contained in Miss. Code Ann. § 99-39-5(2) applied and, further, defendant had completed his state sentence and was no longer in the state correctional system as required under Miss. Code Ann. § 99-39-5(1). *Isaac v.*



State, 793 So. 2d 688 (Miss. Ct. App. 2001).

Individuals convicted prior to April 17, 1984, had three years from that date to file their petition for postconviction relief, where a defendant was convicted in 1973, the last date on which he could file a postconviction petition would be April 17, 1987. *Smith v. State*, 822 So. 2d 298 (Miss. Ct. App. 2001).

The appellant's claims were not time-barred as the limitation period did not apply where he asserted that his parole was improperly revoked since he had not had an opportunity to talk with his parole officer and was not afforded a preliminary hearing. *Edmond v. State Dep't of Cors.*, 783 So. 2d 675 (Miss. 2001).

Because defects complained of by the defendant were nonjurisdictional, his guilty plea operated as a waiver of his claim of defective indictment and his petition, filed 15 years after the expiration of the statute of limitation, was untimely. *Harris v. State*, 811 So. 2d 373 (Miss. Ct. App. 2001).

A petition for postconviction relief was untimely, notwithstanding the petitioner's argument that it should not be procedurally barred because he had been denied the fundamental constitutional right of having minimally effective assistance of counsel due to his attorney's alleged failure to inform him that serving a portion of his sentence was mandatory, since what was told an accused in consultation with his lawyer is especially subject to the need for timely presentation after a conviction has occurred, and even federal constitutional claims may properly be the subject of reasonable time limitations. *Stacy v. State*, 773 So. 2d 413 (Miss. Ct. App. 2000).

A motion to vacate a judgment and sentence was time-barred where the final judgment on the conviction resulting in the defendant's guilty plea was entered on May 25, 1995 and the motion was not filed until November 2, 1998. *Wilson v. State*, 772 So. 2d 1093 (Miss. Ct. App. 2000).

To qualify as newly discovered evidence that can overcome the expiration of the limitation period, evidence must be such that it could not have been discovered by the exercise of due diligence at the time of

trial, and it must be almost certain that the new evidence would cause a different result; however, a claim of ignorance of the law is not considered newly discovered evidence. *Frost v. State*, 781 So. 2d 155 (Miss. Ct. App. 2000).

A defendant's claim of ineffective assistance of counsel and unintelligent, involuntary guilty plea did not reach the level of having violated a fundamental constitutional right and, therefore, did not overcome the expiration of limitations period where the record revealed only that on the day of the defendant's guilty plea, the counsel that was present on his behalf, instead of his counsel of record, presented the petition to enter a plea of guilty, and that the petition had been signed by the defendant and his counsel of record. *Frost v. State*, 781 So. 2d 155 (Miss. Ct. App. 2000).

A motion for postconviction relief was untimely where it was not filed within three years after entry of the judgment of conviction, notwithstanding the petitioner's assertions that he had filed a timely postconviction relief motion with the Mississippi Supreme Court which was dismissed as having been filed in the wrong court, and that he made diligent efforts through retained counsel and with the assistance of inmate writ-writers to get his grievances before the proper adjudicatory body without avail until he finally filed the pro se motion that initiated this proceeding. *Bardwell v. State*, 758 So. 2d 491 (Miss. Ct. App. 2000).

A petitioner was not entitled to relief from the procedural bar of the three-year statute of limitations found in subsection (d) where he asserted that his guilty plea was not knowingly, voluntarily and intelligently entered, that his counsel coerced him to enter a plea, and that his counsel erroneously advised him of the elements of the offenses charged. *Kirk v. State*, 798 So. 2d 345 (Miss. 2000).

The defendant's petition for postconviction relief did not fall into one of the exceptions to the three-year limitation period where he asserted that he was denied effective assistance of counsel in connection with his guilty plea. *Kirk v. State*, 798 So. 2d 345 (Miss. 2000).

A petition for postconviction relief was barred by the three-year statute of limita-

tions where the defendant pled guilty to murder and burglary on August 7, 1995, and, therefore, was required to file any collateral attack on his sentence by August 7, 1998, but did not file his petition until August 12, 1998. *Pinkney v. State*, 757 So. 2d 297 (Miss. 2000).

A pro se prisoner's motion for postconviction relief is delivered for filing under the Uniform Post-Conviction Collateral Relief Act and the Mississippi Rules of Civil Procedure when the prisoner delivers the papers to prison authorities for mailing; further, prison authorities may initiate such procedures as are necessary to document reliably the date of such delivery, by means of a prison mail log of legal mail or other expeditious means, and henceforth, an inmate's certificate of service will not suffice as proof. *Sykes v. State*, 757 So. 2d 997 (Miss. 2000).

The petitioner's alleged mental incompetence did not toll the statute of limitations. *House v. State*, 754 So. 2d 1147 (Miss. 1999).

A petition for postconviction relief was barred where it was filed years after the expiration of time allowed for such a petition, the petitioner cited no intervening decision of either the Mississippi Supreme Court or the United State Supreme Court which would adversely affect the outcome of his conviction or sentence, he brought forth no newly discovered evidence, he did not claim that he was being held past the expiration of his sentence, and he merely raised a claim of ineffective assistance of counsel. *Maston v. State*, 750 So. 2d 1234 (Miss. 1999).

Where the petitioner did not file his petition for postconviction relief until some 11 years after the deadline for such a petition, his petition was time-barred, notwithstanding his contention that he had a right to have his claims heard on the merits in light of the plethora of intervening decisions by the Mississippi Supreme Court and the United States Supreme Court. *Steen v. State*, 748 So. 2d 156 (Miss. 1999).

Regardless of its merit, the appellant's fourth issue, which attacked the revocation of his probation on the basis that he had not been advised that he had been placed on probation, was sufficient to ex-

clude the application of subsection (2) of this section as a basis for dismissing his petition. *Daggans v. State*, 741 So. 2d 1033 (Miss. Ct. App. 1999).

Notwithstanding that the appellant did not seek postconviction relief until more than three years after his guilty plea and conviction, he was entitled to seek to enforce the proper execution of his sentence. *Bell v. State*, 1999 Miss. LEXIS 107 (Miss. Mar. 18, 1999), subst. op., 759 So. 2d 1111 (Miss. 1999).

The prison mailbox rule does not apply to the filing of a petition for postconviction relief; the mailing of such a petition does not constitute its filing. *Sykes v. State*, — So. 2d —, 1999 Miss. App. LEXIS 90 (Miss. Ct. App. Mar. 9, 1999).

The appellant's claim that imposition of the life sentence for murder pursuant to § 97-3-21 as it existed at the time of his 1978 conviction exceeded the statutory authority of the trial court and was not subject to the three-year time frame set out in subsection (2) of this section. *Kennedy v. State*, 732 So. 2d 184 (Miss. 1999).

The trial court erroneously denied the appellant's motion for postconviction relief as time barred since, although the appellant filed his petition 10 years after the applicable statute of limitations had expired, petitions alleging an illegal sentence are not subject to the time bar. *Ivy v. State*, 731 So. 2d 601 (Miss. 1999).

Because the petitioner's application was filed more than three years after the statute of limitations had expired and he made no claim that one of the enumerated exceptions applied, his application was barred. *Williams v. State*, 726 So. 2d 1229 (Miss. Ct. App. 1998).

A postconviction motion was barred where the motion was not brought until almost four years after the movant pleaded guilty and a judgment of conviction was entered. *Sneed v. State*, 722 So. 2d 1255 (Miss. 1998).

Where a judgment of conviction was entered on November 3, 1986, and the defendant did not file his motion for postconviction relief until August 27, 1992, the action was time-barred. *Kincaid v. State*, 711 So. 2d 873 (Miss. 1998).

Habeas petitioner's assertion that it was error of state law for manslaughter



instruction not to be given in capital murder case was procedurally barred from review by federal district court where issue was not presented until defendant's appeal of denial of second motion for postconviction relief and state Supreme Court determined issue was procedurally barred by failure to raise it previously and by three-year time bar in state Uniform Post-Conviction Collateral Relief Act; furthermore, any error was state law error and did not result in federal constitutional violation, and defendant failed to demonstrate sufficient reason for failure to present claim to state courts in procedurally proper manner. *Lockett v. Puckett*, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Statutory exceptions to time bar for postconviction relief motions are intervening decisions which would have adversely affected outcome of petitioner's conviction or sentence, newly-discovered evidence, and expired sentence or unlawful revocation of petitioner's probation, parole or conditional release; overruling *Lockett v. State*, 656 So. 2d 68, *Kincaid v. State*, 1997 WL 280664, — So. 2d —. *Jones v. State*, 700 So. 2d 631 (Miss. 1997).

Three-year statute of limitations barred postconviction relief motion, absent showing that case fell within any of three statutory exceptions to time bar or involved fundamental constitutional right. *Jones v. State*, 700 So. 2d 631 (Miss. 1997).

Fact that petitioner did not challenge constitutionality of his 1983 guilty plea until 1991, when he was convicted and 1983 conviction was used to support sentence enhancement, did not constitute "cause" for failure to file postconviction challenge as to 1983 conviction within 3-year period under subsection (2) of this section (Mississippi Uniform Post-Conviction Collateral Relief Act). *Moore v. Hargett*, 83 F.3d 699 (5th Cir. 1996), reh'g and suggestion for reh'g en banc denied, 95 F.3d 56 (5th Cir. 1996), cert. denied, 519 U.S. 1093, 117 S. Ct. 772, 136 L. Ed. 2d 717 (1997), reh'g denied, 520 U.S. 1140, 117 S. Ct. 1290, 137 L. Ed. 2d 365 (1997).

Three-year time limitation of subsection (2) of this section, governing defense motion for postconviction relief following

guilty plea, did not begin to run anew when defendant was resentenced. *Lott v. Hargett*, 80 F.3d 161 (5th Cir. 1996).

Counsel was not ineffective in failing to object to time limitation on closing argument, absent showing as to how lengthier closing argument would have changed outcome of trial. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Defendant's delay of nearly seven years waived his right to use postconviction petition to challenge sentencing delay as violation of his right to speedy trial. *Marshall v. State*, 680 So. 2d 794 (Miss. 1996).

Although third postconviction relief petition to vacate sentence and resentence would generally have been procedurally barred and time-barred, imposition of sentence of life imprisonment without benefit of parole for murder, imposed when statute did not permit or provide for said sentence, was unenforceable sentence and plain error, capable of being addressed. *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996).

Petitions for postconviction relief filed after expiration of 3-year period commencing upon entry of judgment of conviction are time-barred, unless prisoner's claim falls within one of statutory exceptions. *Bevill v. State*, 669 So. 2d 14 (Miss. 1996).

Defendant's merely raising ineffective assistance of counsel claim was insufficient to surmount procedural bar to his untimely postconviction petition. *Bevill v. State*, 669 So. 2d 14 (Miss. 1996).

Trial court's failure to advise defendant of maximum and minimum sentences when defendant pled guilty did not implicate fundamental constitutional right sufficient to except postconviction case from procedural bar created by defendant's failure to file petition within 3 years of guilty plea. *Bevill v. State*, 669 So. 2d 14 (Miss. 1996).

Parolee's challenge to revocation of parole, based in part on assault conviction while on parole, came within exception to 3-year statute of limitations for filing of motions for postconviction relief for cases in which prisoner claims that his sentence has expired or that his probation, parole or conditional release has been unlawfully revoked. Parolee's challenge was thus not time-barred, even though brought more



than 3 years after assault charges were dismissed on appeal. *Alexander v. State*, 667 So. 2d 1 (Miss. 1995), cert. denied, 517 U.S. 1145, 116 S. Ct. 1441, 134 L. Ed. 2d 562 (1996).

A petition alleging unlawful revocation of parole was not time-barred, in spite of the State's argument that the 3-year statute of limitations began to run at the time of the parole revocation, since there is nothing in subsection (2) of this section to suggest that it was the legislature's intent that the statute of limitations should begin to run at the genesis of the claim in cases citing unlawful revocation of probation or parole. *Fortson v. Hargett*, 662 So. 2d 633 (Miss. 1995).

A postconviction relief petition alleging that the petitioner's ineligibility for parole for a period of 10 years was cruel and unusual punishment was time-barred, in spite of the petitioner's argument that the "wrongful revocation of parole exception" in subsection (2) of this section applied, since the petition was actually an attack on the sentence, not the parole statute. *Logan v. State*, 661 So. 2d 1137 (Miss. 1995).

A petition for habeas corpus relief was not a petition for postconviction relief, since the petitioner was never convicted, and therefore the petition was not time barred on its face under this section. *Strickland v. Howell*, 654 So. 2d 1387 (Miss. 1995).

A defendant was not entitled to an evidentiary hearing on his motion for postconviction relief where the petition was time barred under subsection (2) of this section, and the defendant's allegations were insufficient to require the trial court to grant an evidentiary hearing where his claims were based primarily on the allegation that a witness was available to testify that the crime with which the defendant was charged had been committed by another person and that the witness was not available to make an affidavit because the defendant was incarcerated. *Campbell v. State*, 611 So. 2d 209 (Miss. 1992).

A defendant was not entitled to an evidentiary hearing where his motion for postconviction relief was time barred under this section and the defendant's affi-

davit conflicted with the official court minutes of the proceedings leading up to the judgment under attack. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

The limitation period provided by subsection (2) of this section is not subject to the savings clause in § 15-1-59; the savings clause in § 15-1-59 applies only to actions mentioned in Chapter 1, Title 15 of the Mississippi Code of 1972. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

Under the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) individuals who entered a plea of guilty prior to the date of enactment, April 17, 1984, have three years from April 17, 1984 to file a petition for postconviction relief; thus, a petitioner's motion to vacate a guilty plea was time-barred by virtue of the 3-year statute of limitations set forth in subsection (2) of this section where the petitioner had entered a plea of guilty to armed robbery on November 28, 1983 and filed the motion to vacate the plea on May 10, 1991. *Patterson v. State*, 594 So. 2d 606 (Miss. 1992).

A petitioner's postconviction relief claims based on defective indictments, double jeopardy, involuntariness of guilty pleas, and ineffective assistance of counsel were time barred under subsection (2) of this section where the petitioner was convicted prior to April 17, 1984, his application was filed more than 9 years subsequent to the entry of his guilty pleas, and no appeal or other pleading for relief was filed by him prior to that application. However, the petitioner's claim that he was erroneously sentenced to life imprisonment after entering a plea of guilty to forcible rape because such a sentence was within the sole province of the jury, was excepted from the time limitations of subsection (2) of this section since the claim involved a denial of due process in sentencing, and errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration. *Lockett v. State*, 582 So. 2d 428 (Miss. 1991).

A defendant's motion for an out-of-time appeal was improperly denied, where the

defendant had employed an attorney to carry the case to conclusion, including an appeal, and the defendant wanted and requested an appeal, even though the attorney attempted to excuse his failure to timely perfect an appeal on the ground that he had not been paid in accordance with the fee agreement and that he wrote 2 letters advising his client that the court fees and court costs had to be paid prior to the appeal being taken. If grounds for withdrawal or termination exist, the attorney must seek a court's permission to properly withdraw from representation, but the attorney has the duty to take all necessary steps to protect the defendant's right of appeal. *Triplett v. State*, 579 So. 2d 555 (Miss. 1991).

A defendant desiring an out-of-time appeal must, at the very least, show that the failure to timely perfect an appeal was through no fault of his or her own. Thus, a defendant's application for an out-of-time appeal was properly denied where the defendant was fully advised of his right to appeal, he understood his right to appeal, and he did nothing indicating that he wished an appeal until well after the time limit had expired; the defendant's sworn waiver of the right to appeal functioned as substantial credible evidence that the defendant received contemporaneous advice regarding his right to appeal and that he knowingly and intelligently waived that right. *Fair v. State*, 571 So. 2d 965 (Miss. 1990).

A petitioner was not entitled to proceed with an out-of-time appeal, even though he alleged that he had never received a copy of the order from which he sought to appeal and that this prevented him from timely appealing through no fault of his own, where his original postconviction petition to the circuit court to set aside his guilty plea was time barred. When one seeks an out-of-time appeal from a ruling of a trial court on a petition that was already time barred by law at the time it was filed, an out-of-time appeal would accomplish nothing. *Freelon v. State*, 569 So. 2d 1168 (Miss. 1990).

Pro se defendant not barred from seeking relief under Post-Conviction Collateral Relief Act arising from guilty plea entered in 1979, although motion to va-

cate was not filed until 1986, where 3 year limitation period had been held to operate prospectively only. *Jackson v. State*, 506 So. 2d 994 (Miss. 1987).

The 3-year statute of limitations under subsection (2) of this section applies prospectively to individuals convicted prior to April 17, 1984. *Smith v. State*, 500 So. 2d 973 (Miss. 1986).

Three-year statute of limitations was not bar to a defendant whose conviction had been affirmed on direct appeal before the statute was enacted. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

Defendant convicted prior to April 17, 1984, has 3 years from that date to file petition for postconviction relief. *Odom v. State*, 483 So. 2d 343 (Miss. 1986).

### 9. Plea bargain; with defendant.

Where defendant was informed of the circumstances and consequences of a guilty plea, he entered the plea freely and voluntarily under oath, and he met the competency standard while taking certain medications, a post-conviction relief motion was denied because there no reason to set aside the plea to sexual offenses. *McNeal v. State*, 951 So. 2d 615 (Miss. Ct. App. 2007).

Where defendant was found guilty of selling cocaine and later pled guilty to two other charges, defendant failed to prove that he was entitled to an out-of-time appeal from the first conviction under Miss. Code Ann. § 99-39-5; although defendant initially wanted to appeal his first conviction, he changed his mind as a result of a plea agreement. *Andrews v. State*, 923 So. 2d 239 (Miss. Ct. App. 2006).

Motion for post-conviction relief was denied because there was no prosecutorial misconduct based on the failure to follow a plea agreement since defendant was warned that the recommended sentence would not have been followed if he failed to appear at a sentencing hearing; the fact that it was rescheduled did not change the result since defendant had notice of such. *Rhone v. State*, — So. 2d —, 2006 Miss. App. LEXIS 863 (Miss. Ct. App. Nov. 21, 2006).

Denial of an inmate's petition for post-conviction relief was affirmed as the State did not breach its plea agreement to recommend that defendant receive a twelve-



year sentence with only six years to serve. The record indicated that the State abided by the agreement, but that the trial judge, in his discretion, decided to impose a stiffer sentence. *Morris v. State*, 917 So. 2d 799 (Miss. Ct. App. 2005).

A capital murder defendant could not be sentenced to life imprisonment without the possibility of parole pursuant to a plea bargain agreement, since § 97-3-21 does not provide such a penalty; the provision in the plea bargain providing for life without parole was not a permissible option under the statute, and therefore the court had no authority to issue such a sentence, and the plea contract was invalid as against public policy. *Patterson v. State*, 660 So. 2d 966 (Miss. 1995).

A defendant was not entitled to postconviction relief on the ground that the prosecution breached its plea bargain agreement, even if the prosecution failed to explain the details of the defendant's eligibility for parole; such a failure would not amount to a breach of the plea bargain agreement since eligibility for parole is a matter of legislative grace and is not a "consequence" of a plea of guilty. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

#### 10. —With co-defendant.

A capital murder defendant was not denied effective assistance of counsel on direct appeal by his attorney's alleged failure to bring to the Supreme Court's attention a plea bargain with an accomplice who testified as a witness, where the Supreme Court was well aware that the accomplice had been permitted to plead guilty to manslaughter and that he had been sentenced to 15 years' imprisonment but had served only 2½ years. *Culberson v. State*, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

A defendant is entitled to know of any advance plea agreement between the state and a codefendant who is to testify against him, and a general discovery request is adequate to impose upon the prosecution the duty of disclosure. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

Non-disclosure of the prosecutor's plea agreement with a codefendant under circumstances where the terms of that agreement might reasonably touch upon

the codefendant's credibility or otherwise undermine confidence in the outcome of the trial may vitiate a criminal conviction and require a new trial. Such rule emanates from *Brady v. Maryland* (1963) 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, later proceeding 2 Md App 146, 233 A2d 378, habeas corpus proceeding (DC Md) 314 F Supp 799, affd (CA4 Md) 443 F2d 1307 and (not followed *United States v. Oxman* (CA3 Pa) 740 F2d 1298, 16 Fed Rules Evid Serv 505 (disagreed with *United States v. Borello* (CA2 NY) 766 F2d 46, 18 Fed Rules Evid Serv 569, on remand (ED NY) 624 F Supp 150) and vacated (US) 87 L. Ed. 2d 673, 105 S. Ct. 3550, on remand (CA3 Pa) 774 F2d 1224, cert den (US) 89 L. Ed. 2d 572, 106 S. Ct. 1263). *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to postconviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

#### 11. Successive writs.

Issues raised in defendant's second motion for post-conviction collateral relief (PCR) under consideration were essentially the same as were considered by the courts in the his first PCR and appeal. Thus, his claims were procedurally barred based on the successive writ bar and res judicata; in addition, his second PCR motion was filed more than 10 years after his initial guilty plea and was procedurally barred, and because he filed his second PCR motion in the circuit court without first filing a motion with the supreme court for leave to file in the circuit court the trial court was without jurisdiction to



consider said motion. *Sykes v. State*, 919 So. 2d 1064 (Miss. Ct. App. 2005).

Defendant's issues were procedurally barred for the failure to: (1) timely appeal, and (2) as a successive writ. On at least two occasions, in June 2002 and September 2002, defendant filed petitions requesting relief which could have been granted within the purview of the Mississippi Uniform Post-Conviction Collateral Relief Act pursuant to Miss. Code Ann. § 99-39-5. Those petitions for relief were denied and no appeals were taken, and the exceptions under Miss. Code Ann. § 99-39-23(6), allowing for the filing of a successive writ, did not apply. *Stone v. State*, 872 So. 2d 87 (Miss. Ct. App. 2004).

Although third postconviction relief petition to vacate sentence and resentence would generally have been successive writ barred and procedurally barred, imposition of sentence of life imprisonment without benefit of parole for murder, imposed when statute did not permit or provide for said sentence, was unenforceable sentence and plain error, capable of being addressed. *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996).

A trial court correctly denied, as a successive writ, a defendant's second motion for postconviction relief, even though the second pleading was denominated as a "Petition for Habeas Corpus Post-Conviction Relief," since the Post-Conviction Collateral Relief Act effectively supplanted the prior statutory and rule versions of the writ of habeas corpus so that the defendant's habeas petition would be treated as a petition for postconviction relief filed pursuant to the Post-Conviction Relief Act. *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).

## 12. Notice of right to appeal.

Circuit court's failure at sentencing hearing to elicit responses from defendant regarding his desire to appeal his case, his understanding of time frame in which he could make appeal and his financial ability to pursue appeal did not entitle defendant to out-of-time appeal, where defense counsel obtained signed witness statement indicating that defendant did not wish to appeal immediately following sentencing hearing, and circuit court conducted full-scale evidentiary hearing as to

whether to allow out-of-time appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

While it is preferable for circuit court to make some inquiries as to whether defendant understands the rights of which he has been advised at sentencing hearing, where there has been full-scale evidentiary hearing as to whether out-of-time appeal should be allowed, fact that trial judge merely advised defendant of his or her right to appeal does not, in and of itself, warrant grant of out-of-time appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Knowledge that appeal exists is not the same as knowledge that there is right to appeal, for purpose of requirement that defendant be advised of his right to appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Defendant who signed statement indicating that his attorney had advised him of his right to appeal his conviction and sentence and that after discussing his case with his attorney, he did not wish to pursue appeal, was not entitled to file out-of-time appeal when he changed his mind nearly a year later. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Trial courts should advise criminal defendants of their rights concerning appeal on the record at the time of sentencing and should solicit a decision in that regard. Should a decision be made on the record to appeal, the defendant should be advised that the decision will stand unless a written statement to the contrary, signed by the defendant and the attorney, is filed with the court. Should the decision be made to waive appeal, the defendant should nevertheless be informed of the timeliness for appeal and told that the decision to waive shall stand unless the defendant gives written notice to the court and the attorney prior to the expiration of the time. Should no decision be made, the court should inform the defendant that the failure to express the desire to appeal shall be considered a waiver of the right to appeal and that such waiver will stand unless the defendant gives written notice

to the court and counsel prior to the expiration of the time in which to perfect the appeal. *Wright v. State*, 577 So. 2d 387 (Miss. 1991).

### 13. Jurisdiction.

Trial court erred in finding that it lacked jurisdiction to hear the inmate's post-conviction relief claim where the State of Mississippi had a detainer on the inmate while he served a federal sentence, and he would be released to Mississippi immediately following his present incarceration to complete a Mississippi sentence, which was running concurrently with the federal sentence. *Putnam v. Epps*, — So. 2d —, 2007 Miss. App. LEXIS 36 (Miss. Ct. App. Feb. 6, 2007).

Incomplete record did not allow the supreme court to determine if, under Miss. Code Ann. § 99-39-5(1)(g), defendant's release was unlawfully revoked; the case was remanded to the circuit court for an expansion of the record under Miss. Code Ann. § 99-39-17, if necessary, an evidentiary hearing under Miss. Code Ann. § 99-39-19, and consideration of and a ruling on the merits of defendant's petition. *Creel v. State*, 944 So. 2d 891 (Miss. 2006).

Appellate court reversed the denial of an inmate's motion for post-conviction relief because the inmate's probationary period expired in October 1997, and the circuit court did not have jurisdiction to revoke his probation in May 2000. *Barrett v. State*, 912 So. 2d 1077 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of inmate's petition for post-conviction relief as the department of corrections clearly had authority to revoke his earned credits under Miss. Code Ann. § 47-5-138 for disciplinary violations, and the inmate had not exhausted all his administrative remedies as required by Miss. Code Ann. § 47-5-803(2); thus, the appellate court and the trial court were without jurisdiction to hear the inmate's claims. *Sanders v. Miss. Dep't of Corr.*, 912 So. 2d 189 (Miss. Ct. App. 2005).

Trial court lacked jurisdiction to rule on an inmate's motion for postconviction relief because the inmate was not a prisoner in Mississippi; the evidence showed that the inmate was released from the custody of Mississippi after a sentence for bur-

glary expired, and the inmate's return address showed that the inmate was incarcerated in Illinois. *Zambrella v. State*, 906 So. 2d 844 (Miss. Ct. App. 2004).

A defendant's postconviction relief action for a stay of execution of a lower court judgment revoking probation, which was filed in the Supreme Court of Mississippi, would be dismissed without prejudice as having been filed in the wrong court, even though the defendant's previous direct appeal to the Supreme Court seeking review of the probation revocation was dismissed "without prejudice for [the defendant] to institute a postconviction relief action under subsection (1)(g) of this section," and thus the Supreme Court was arguably the last court to exercise jurisdiction and should therefore be the court of first resort for the postconviction petition. For the Supreme Court to acquire exclusive, original jurisdiction over a petition filed under the Post-Conviction Collateral Relief Act, the Supreme Court must have previously made some final determination going to the merits of the underlying conviction and sentence; it is not enough that the Supreme Court dismissed an appeal without prejudice for lack of jurisdiction, and that the Supreme Court granted a temporary stay of execution incident to attempted postconviction proceedings. In order to obtain Supreme Court review, the defendant would be required to file an appropriate petition in the lower court, claiming under subsection (1)(g) of this section that his probation has been unlawfully revoked, and if dissatisfied with the ruling of that court he could appeal that ruling to the Supreme Court pursuant to § 99-39-25. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

A trial court erred in concluding that the State of Florida lost jurisdiction over a petitioner when it released her to the custody of a Mississippi bail bondsman because the effect of Florida's release of the petitioner to the State of Mississippi was a question to be answered in the first instance by a proper court of the State of Florida. Furthermore, the parole board was without statutory or other authority to condition the petitioner's parole on her voluntarily submitting herself to the custody of the State of Florida, which the



petitioner had refused to do on several occasions, and the trial court compounded this error by removing this condition and ordering the parole board to release the petitioner immediately, which was beyond the court's authority since determining the eligibility for parole is peculiarly and solely a discretionary function of the parole board. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

#### 14. Habeas corpus.

State prisoner's federal habeas corpus petition was dismissed with prejudice for failing to satisfy the exhaustion requirement of 28 U.S.C.S. § 2254(b)(1)(A), which requires a petitioner to exhaust the remedies available to her in the state courts prior to filing for federal habeas corpus relief, and this prisoner had not first sought review of the revocation of her parole in state court under Miss. Code Ann. § 99-39-5(1). *Griffis v. Desoto County*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 29921 (N.D. Miss. Nov. 15, 2005).

Where an inmate filed a petition for a writ of habeas corpus and was requesting that his sentence be corrected, the petition was treated as a petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-5. *Bynum v. State*, — So. 2d —, 2005 Miss. App. LEXIS 460 (Miss. Ct. App. July 19, 2005).

Habeas petitioner's claims raising alleged deficiencies of indictment and challenging evidence at murder trial constituted claims for postconviction relief, and thus had to be filed within three-year period after enactment of statute allowing prisoners to seek postconviction relief from judgment. *Strickland v. State*, 698 So. 2d 1089 (Miss. 1997).

The time limitations provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) do not work an unconstitutional suspension of the writ of habeas corpus. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, Miss.Sup.Ct.R. 9 or Unif.Crim.R.Cir.Ct.Prac. 7.02 which pur-

ports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral postconviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure postconviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738 (Miss. 1990).

A petitioner's petition for a writ of habeas corpus would be treated as a motion under subsection (1)(g) of this section, which authorizes a postconviction motion in the nature of collateral review by the petitioner, since she was in custody under a Mississippi conviction and claimed that she was "unlawfully held in custody." Although the petitioner was convicted in 1981, and the conviction was affirmed on direct appeal in 1983, the substantive portions of the Post-Conviction Relief Act, which became effective April 17, 1984, were applicable to the petition. Furthermore, the waiver and procedural bar provisions of the Act were applicable even though the petitioner was tried and convicted prior to the effective date of the Act. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

#### 15. Intervening decisions.

Defendant's petition for post-conviction relief was denied because it was procedurally barred under Miss. Code Ann. § 99-39-5(2) since it was filed more than five years after a guilty plea was entered for the sale of cocaine; defendant did not cite any intervening case law that would have counted as an exception. *Glenn v. State*, 940 So. 2d 969 (Miss. Ct. App. 2006).



Denial of the inmate's petition for post-conviction relief was appropriate because his motion was time-barred under Miss. Code Ann. § 99-39-5(2) and there was no applicable exception to the time limit; the supreme court held that the inmate was required, and failed, to prove that he was prejudiced by evidence that should have been excluded in a simple murder trial. *Lambert v. State*, 941 So. 2d 804 (Miss. 2006).

Pursuant to Miss. Code Ann. § 99-39-5(2), Atkins was an "intervening decision" of the United States Supreme Court that saved an inmate's postconviction petition before the state supreme court from being procedurally barred. *Conner v. State*, 904 So. 2d 105 (Miss. 2004).

Trial court was without jurisdiction to consider an inmate's motion for postconviction relief to the extent that it requested review of his 1986 conviction because he was not serving any sentence under the 1986 conviction at the time he filed the motion; hence, he was barred from bringing a postconviction relief motion regarding that conviction. *Torns v. State*, 866 So. 2d 486 (Miss. Ct. App. 2003).

*Atkins v. Virginia*, declaring the execution of the mentally retarded to be unconstitutional, was an "intervening decision" under Miss. Code Ann. § 99-39-27(9), such that the procedural bars raised by the State, that of timeliness and successive application, were inapplicable. *Foster v. State*, 848 So. 2d 172 (Miss. 2003).

Defendant was not entitled to out-of-time postconviction relief from a conviction of driving under the influence causing the death of another where the motion was based on the decision of the Mississippi Supreme Court in *McDuff v. State*, 763 So.2d 850 (Miss. 2000), which declared Miss. Code Ann. § 63-11-8 mandating blood alcohol testing of all persons involved in a fatal traffic accident to be unconstitutional; decision did not affect either the statute under which defendant was charged or sentenced and defendant could have challenged the statute in the trial court or on direct appeal rather than pleading guilty to the charge after the trial court denied his motion to suppress. *Gross v. State*, 852 So. 2d 671 (Miss. Ct. App. 2003).

A reversal and remand of petitioner's case did not qualify as an intervening decision within subsection (2) of this section. *Hester v. State*, 749 So. 2d 1221 (Miss. Ct. App. 1999).

A petitioner was not entitled to postconviction relief pursuant to § 99-39-21(1) or § 99-39-21(2). *Nixon v. State*, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Subsection (2) of this section does not include an intervening decision adversely affecting the relationship between the sentence under attack and the sentence presently served or given effect; a capital murder defendant's conviction or sentence could not be actually adversely affected unless and until his prior conviction used as an aggravating factor was properly and successfully challenged. *Culberson v. State*, 612 So. 2d 342 (Miss. 1992).

The intervening decision exception to the 3-year statute of limitations set forth in subsection (2) of this section and § 99-39-23(6) applies only to those decisions that create new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction or during the 3-year period circumscribed by the statute of limitations; thus, in a proceeding regarding a petitioner's motion to vacate a guilty plea, the decision in *Vittitoe v. State* (Miss. 1990) 556 So. 2d 1062, which was based on the failure of the trial court to follow the mandates of Rule 3.03, Miss.Unif.Crim.R.Cir.Ct.Prac. when the defendant entered his guilty plea, did not qualify under the intervening decision exception because it simply recognized and applied a pre-existing rule that had been in existence for at least 4 years when the petitioner entered his guilty plea. *Patterson v. State*, 594 So. 2d 606 (Miss. 1992).

Intervening decision alone does not preclude waiver under § 99-39-21, but can only except case from effect of 3-year statute of limitations in subsection (2) of this section and prohibition of second petitions in § 99-39-27(9). *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

**16. Burden of proof.**

When issue of voluntariness is raised, burden remains upon state to prove voluntariness of guilty plea by clear and convincing evidence. *Courtney v. State*, 704 So. 2d 1352 (Ct. App. 1997).

**17. Appropriate sentence.**

Trial court properly denied defendant's motion for post-conviction relief to clarify his sentence because his motion was filed well beyond the three-year statute of limitations; because defendant's motion collaterally attacked his sentence, it fell under the Mississippi Uniform Post-conviction Collateral Relief Act. *Judge v. State*, 933 So. 2d 1012 (Miss. Ct. App. 2006).

In a manslaughter case, the trial court correctly dismissed defendant's motion for post-conviction relief as time-barred as she was not serving an illegal sentence; the combination of her 4 years of post-release supervision and 16 years' incarceration resulted in a 20-year sentence, the permissible maximum sentence as per Miss. Code Ann. § 47-7-34 *Brown v. State*, 923 So. 2d 258 (Miss. Ct. App. 2006).

Inmate was sentenced for two counts of grand larceny and could have received a maximum sentence of ten years in the custody of Mississippi Department of Corrections, but instead, the trial court suspended five years of the ten-year sentence, leaving five years of incarceration to serve, with two years of post-release supervision. Thus, the inmate's sentence was not illegal, and the trial court properly denied the inmate's motion for post-conviction relief. *Hill v. State*, 912 So. 2d 494 (Miss. Ct. App. 2005).

Denial of the inmate's motion for post-conviction relief was proper where, had the information of his HIV diagnosis been available to the judge, it would not have changed the fact that the inmate violated the terms of his probation; however, the court remanded for proper sentencing. Miss. Code Ann. § 99-39-5(1)(e), stating that his failure to successfully complete the Regimented Inmate Discipline (RID) Program did not occur because of any misconduct or similar failure on his part. *Curry v. State*, 855 So. 2d 452 (Miss. Ct. App. 2003).

**18-20. [Reserved for future use.]****II. UNDER FORMER § 99-35-145.****21. In general.**

Defendant in criminal trial who has litigated matters of fact and law at trial and whose conviction has been affirmed, may not through writ of error or coram nobis present and litigate question again even though framed and placed in setting of federal constitutional claim. In *re Hill*, 467 So. 2d 669 (Miss. 1985).

A writ of error coram nobis does not lie to relitigate matters finally decided by the state Supreme Court. *Auman v. State*, 285 So. 2d 146 (Miss. 1973).

This section [Code 1942, § 1992.5] provides a comprehensive procedure for the rehearing of criminal cases wherein errors of a constitutional nature have occurred. *King v. Cook*, 287 F. Supp. 269 (N.D. Miss. 1968).

The purpose of the legislature in enacting this section [Code 1942, § 1992.5] was to provide a meaningful and effective procedure for the protection of constitutional rights to those convicted of crime, and the highest court of the state has interpreted the act in accordance with that purpose. *King v. Cook*, 287 F. Supp. 269 (N.D. Miss. 1968).

The general scope of a petition for writ of error coram nobis is to bring before the court a judgment previously rendered by it, and it is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record which deprive the accused without fault on his part of the constitutional right to a fair trial. In *re Broom*, 251 Miss. 25, 168 So. 2d 44 (1964).

Writ of coram nobis, although recognized by statute, is an ancient common-law writ, the purpose of which is to correct a mistake of fact and not an error of law. *Pryor v. Woodall Indus., Inc.*, 250 Miss. 672, 167 So. 2d 920 (1964).

A writ of coram nobis is ordinarily limited to cases where no other remedy is provided by law. *Pryor v. Woodall Indus., Inc.*, 250 Miss. 672, 167 So. 2d 920 (1964).

Where the petitioner in a workman's compensation case had another legal remedy which would provide due process, a petition for writ of coram nobis would be



dismissed by the supreme court. *Pryor v. Woodall Indus., Inc.*, 250 Miss. 672, 167 So. 2d 920 (1964).

*Coram nobis*, not *habeas corpus*, is the proper mode of examination of the legality of a conviction of crime. *Smith v. State*, 155 So. 2d 494 (Miss. 1963).

## 22. Initiation of proceedings for writ.

Where the petition for a writ of error *coram nobis* that was proposed to be filed in the trial court did not accompany the application to the Supreme Court, a motion to dismiss would be sustained, but without prejudice to the applicant to file a corrected application in accord with Code 1942 § 1992.5, and Supreme Court Rule 38. *Lanier Co. v. Wright*, 275 So. 2d 103 (Miss. 1973).

Although defendant's motion for a new trial based on newly discovered evidence must be denied because it seeks to have the supreme court consider matters not in the record before it before review, the dismissal is made without a prejudice of defendant's right to file a petition in compliance with this section [Code 1942, § 1992.5]. *Tarrants v. State*, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823 (1971).

Where a defendant, under a life sentence after a conviction of murder, after the record on appeal was filed with the supreme court and the case had been briefed, filed a motion for a new trial based upon newly discovered evidence, the motion was in the nature of a remedy supplemental to a writ of error *coram nobis*, and was therefore prematurely filed and would be dismissed but without prejudice to the right of the defendant to file, if he should desire, a petition in compliance with this section [Code 1942, § 1992.5] and with Mississippi Supreme Court Rule 38. *Diddlemeyer v. State*, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

This section [Code 1942, § 1992.5] creates a postconviction remedy which must be initiated in the supreme court, and to require, as a condition precedent to a second hearing in the trial courts an order of the supreme court allowing the filing of a *coram nobis* petition in the trial court.

*Smith v. State*, 155 So. 2d 494 (Miss. 1963).

The policy of the supreme court is not to exercise the authority conferred upon it to hear oral testimony on disputed issues of fact on an application for leave to file in the circuit court a petition for a writ of *coram nobis*; nor will it decide whether upon the application and answer the applicant is entitled to the writ as a matter of law. *Rogers v. State*, 241 Miss. 593, 130 So. 2d 856 (1961).

Although the statutory procedure for petition for writ of error *coram nobis* and the procedure in application for permission to file a petition of writ of *coram nobis*, are slightly different, the substantive aspects of both are substantially the same. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

## 23. Requirement that judgment of conviction be affirmed on appeal.

Where convictions involved in petition for writ of *coram nobis* had not been affirmed on appeal by the Supreme Court, this section did not apply and the circuit court had exclusive jurisdiction to entertain the petition for a writ, and it was error for that court to dismiss the petition without an evidentiary hearing. *Dunn v. Reed*, 309 So. 2d 516 (Miss. 1975).

A petition for a writ of error *coram nobis* and a motion to vacate a judgment and for a new trial, were premature and would be continued, where at the time of their filing the defendant's appeal from a manslaughter conviction was pending and the reviewing court had not yet considered the merits of the appeal. *Murphree v. State*, 222 So. 2d 694 (Miss. 1969).

A writ of error *coram nobis* is of broad scope and range, particularly giving cognizance to violation of constitutional rights occurring in criminal trials, and it becomes operative upon affirmation of conviction in the Mississippi Supreme Court. *King v. Cook*, 287 F. Supp. 269 (N.D. Miss. 1968).

Where the supreme court has not affirmed the conviction of the defendant, a motion for leave to file a petition for a writ



of error coram nobis does not lie under this section [Code 1942, § 1992.5]. *Harvey v. State*, 251 Miss. 36, 168 So. 2d 49 (1964).

This section [Code 1942, § 1992.5] applies only where a judgment of conviction has been affirmed by the supreme court, and where the petitioner's conviction was not affirmed and she did not appeal from it, this section is inapplicable and the state's motion to dismiss must be sustained. *In re Broom*, 251 Miss. 25, 168 So. 2d 44 (1964).

This section [Code 1942, § 1992.5] applies only where a petition for a writ of error coram nobis has been filed or sought to be filed after the judgment and conviction has been affirmed by the supreme court. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

#### **24. Grounds for grant of application or issuance of writ.**

Relief under petition for writ of error coram nobis is not available when petitioner only alleges technical violation of Rule 3.03 Uniform Criminal Rules of Circuit Courts of State of Mississippi in that trial judge did not advise petitioner of special provisions of parole. *Womble v. State*, 466 So. 2d 910 (Miss. 1985).

There is no provision for the supreme court to hear a motion to consider and review a sworn statement of a witness stating he testified falsely, and if the convicted defendant has any remedy because of the facts alleged in the motion it will be found in the provisions of this section [Code 1942, § 1992.5]. *Knight v. State*, 204 So. 2d 568 (Miss. 1967).

A writ of error coram nobis was granted and the original judgments against the defendant entered on his pleas of guilty to the crime of burglary were vacated and his case remanded for a new trial where he did not have counsel for his own defense, and had not competently and intelligently waived the right to counsel. *Scott v. State*, 190 So. 2d 875 (Miss. 1966).

Where doubt exists whether there was an effective waiver of a federal constitutional right by the defendant's failure to raise such right during the course of the

trial, her petition to be allowed to file an application for a writ of error coram nobis should be granted. *Thompson v. State*, 188 So. 2d 239 (Miss. 1966).

A defendant, highly intelligent and well informed on criminal procedure, who, although not represented by counsel, was present at all times when his codefendant conferred with the attorneys representing him, and who, following entries of pleas of guilty, received the identical sentence imposed upon his codefendant, had not only had the benefit of counsel but had intelligently and competently waived any rights he had to counsel designated as his own, and his petition for a writ of error coram nobis was properly denied. *Woodruff v. State*, 187 So. 2d 883 (Miss. 1966), cert. denied, 386 U.S. 919, 87 S. Ct. 881, 17 L. Ed. 2d 790 (1967).

On a coram nobis petition of a convicted defendant alleging that he was deprived of the right of counsel at a critical point in his arraignment or trial is entitled, at most, to a new trial and not to his release. *Allred v. State*, 187 So. 2d 28 (Miss. 1966).

A petition for writ of error coram nobis was denied where there was nothing in the record to indicate that the defendant was prejudiced by the failure to afford him a preliminary hearing. *Petition of Woodruff* (Miss. 1965) 253 Miss. 827, 179 So. 2d 268.

Evidence held insufficient to support petition under this section [Code 1942, § 1992.5]. *Smith v. State*, 158 So. 2d 686 (Miss. 1963), cert. denied, 377 U.S. 1001, 84 S. Ct. 1935, 12 L. Ed. 2d 1050 (1964).

Probable cause for the issuance of a writ of error coram nobis held to have been shown, where defendant did not have advice of counsel before pleading guilty. *Thornhill v. State*, 246 Miss. 312, 149 So. 2d 27 (1963).

#### **25. —Newly discovered evidence.**

Application for leave to file a writ of error coram nobis for newly discovered facts will not be entertained unless there is a substantial probability that a new hearing would produce a different result. *Gordon v. State*, 160 So. 2d 73 (Miss. 1964).

A petition filed under this provision, in an application for a writ of error coram nobis for newly discovered evidence, may

be entertained as a remedy supplemental to the writ of error coram nobis, and will be sustained only if the newly discovered evidence is of such a nature that it would conclusively cause a different result. *Kennard v. State*, 246 Miss. 209, 148 So. 2d 660 (1963).

Newly discovered evidence insufficient to give rise to grave doubts of defendant's guilt, or to raise a reasonable probability of a different verdict, is insufficient ground for a new trial, and application for writ would be denied. *Entrekin v. State*, 242 Miss. 264, 134 So. 2d 926 (1961).

A petition for leave to file in the trial court a motion to vacate judgment and for a new trial on the grounds of newly discovered evidence by one whose conviction has been affirmed on appeal should be confined to the narrowest limits compatible with justice, and will be sustained only if newly discovered evidence is of such nature that it would be practically conclusive that it would cause a different result. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

A petition for leave to file in the trial court a motion to vacate judgment and for new trial on ground of newly discovered evidence by one whose conviction has been affirmed on appeal will not be sustained if the petitioner or his attorney knew of the existence, or by the exercise of due diligence could have discovered such evidence, at the time of the trial, or if the newly discovered evidence is merely cumulative or tends to impeach other testimony offered at the trial. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

A petition for leave to file in the trial court a motion to vacate a judgment and for a new trial on the grounds of newly discovered evidence filed under this section [Code 1942, § 1992.5] will be entertained in the supreme court as being a remedy supplemental to the writ of error coram nobis, where the petition is confined to the narrowest limits compatible with justice, and shows that the newly discovered evidence is of such nature that it would be practically conclusive that it would cause a different result, it was not

known, or could not have been discovered by the exercise of due diligence, by the petitioner or his attorney, and is not merely cumulative or merely tends to impeach testimony offered at the trial. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

Petition for leave to file in a trial court a motion to vacate the judgment and for a new trial on the ground of newly discovered evidence by petitioner, whose conviction for rape had been affirmed by the supreme court, was sustained and granted where facts set out in the petition gave rise to grave doubts as to the petitioner's guilt. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

A writ of coram nobis cannot be used on the basis of newly discovered evidence. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

## 26. Petitioner under death sentence.

The trial court properly denied defendant coram nobis relief under § 99-35-145[Repealed] on the basis that an appeal to hear testimony and consider new evidence had been perfected to a higher court. *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351 (1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366 (1985).

Petitioner, who was convicted of murder and sentenced to death, was entitled to a writ of error coram nobis in the circuit court, pursuant to § 99-35-145[Repealed], for the purpose of determining whether he was denied effective assistance of counsel during the sentencing phase of his trial, and for the circuit court to make findings of fact with reference to the numerous allegations of the petition; if the circuit court found that petitioner was not denied effective assistance of counsel, that finding would be immediately certified to the Supreme Court, and if court found that petitioner was denied effective assistance of counsel, then it should impanel a jury at the earliest convenient time for the purpose of conducting a rehearing on the



question of whether petitioner should suffer the penalty of death or be sentenced to life imprisonment. *King v. Thigpen*, 446 So. 2d 600 (Miss. 1984).

In order for the supreme court to sustain an application for permission to file in circuit court petition for writ of error coram nobis on ground that applicant has become insane since his conviction for murder and imposition of death sentence, the evidence must establish reasonable probability that the petitioner is insane and that his execution should be stayed. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

The question whether petition for writ of error coram nobis with its accompanying affidavits, establish, with sufficient degree of certainty, the necessary facts to authorize supreme court to grant the application is determined by evidence which establishes with reasonable probability that the applicant is insane and that his execution should be stayed. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

An application for permission to present to, and have heard by the trial judge of the circuit court a petition for writ of error coram nobis, on the ground that the petitioner had become insane since his conviction of murder and imposition of death sentence, can be entertained by the supreme court. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

## 27. Rights of successful petitioner.

On a coram nobis petition of a convicted defendant alleging that he was deprived of the right of counsel at a critical point in his arraignment or trial, petitioner is entitled, at most, to a new trial and not to his release. *Allred v. State*, 187 So. 2d 28 (Miss. 1966).

Where a convicted murderer petitioned the supreme court for a writ of error coram nobis to review its judgment of conviction and death sentence and the

supreme court acted immediately which was five days before the date and rendition of the court's final decision in order to enable the petitioner's attorney to prepare for an appeal to the United States Supreme Court, the petitioner could not complain of filing of the state's reply brief and counteraffidavits between the time his attorney was advised of the state supreme court's decision denied petition and the time of rendition of the final decision. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

## 28. Resort to federal courts.

The exhaustion principle required a habeas corpus petitioner to present his claims first to the Mississippi courts in a writ of error coram nobis pursuant to Miss Code § 99-35-145[Repealed], framed as federal constitutional violations, before federal courts would entertain his habeas corpus petition. *Minor v. Lucas*, 697 F.2d 697 (5th Cir. 1983).

In view of the ruling of the Mississippi Supreme Court that a new trial would not be granted under this section [Code 1942, § 1992.5] on the ground of newly discovered evidence which served only to impeach evidence previously introduced, and it was on this basis that the petitioner must necessarily seek a new trial by coram nobis proceedings, a person seeking a writ of habeas corpus in federal court had, as a practical matter exhausted his state court conviction remedies even though he had not proceeded under this section [Code 1942, § 1992.5], and he was therefore entitled to a writ of habeas corpus. *Summerville v. Cook*, 311 F. Supp. 931 (N.D. Miss. 1970).

Where, because of antecedent circumstances in the case, it would be futile, and not required by the principle of comity, a federal court will not require a petitioner for a writ of habeas corpus to exhaust his state remedies prior to acting upon the merits of the petition. *Henry v. Williams*, 299 F. Supp. 36 (N.D. Miss. 1969).

Although ordinarily federal district courts will decline to act upon the merits of the state prisoner's petition for a writ of habeas corpus until he has exhausted the



state postconviction remedies provided in this section [Code 1942, § 1992.5]; where a defendant who had unsuccessfully appealed to the Mississippi Supreme Court and was subsequently denied relief by the United States Supreme Court no purpose would be served by relegating the petitioner to further state remedy. *Henry v. Williams*, 299 F. Supp. 36 (N.D. Miss. 1969).

Upon denial of a convicted defendant's motion before the supreme court of Mississippi asking leave to file a motion for a new trial in the convicting court he has exhausted his state remedies and it is unnecessary, subsequently, for him to file a petition for a writ of error coram nobis prior to initiating a habeas corpus proceeding in the federal courts. *Kitchens v. State*, 290 F. Supp. 856 (S.D. Miss. 1968).

The federal district court will not proceed to hear a petition for writ of habeas corpus until the petitioner had exhausted his remedies in the state courts under this section [Code 1942, § 1992.5]. *King v. Cook*, 287 F. Supp. 269 (N.D. Miss. 1968).

In the interest of state-federal judicial relations, comity requires that the issue of the exclusion as jurors of persons who have conscientious scruples against the death penalty be resolved by the state courts where an adequate state remedy is available; and apparently this section [Code 1942, § 1992.5] provides an adequate procedure for such determination. *Irving v. Breazeale*, 400 F.2d 231 (5th Cir. 1968).

Where defendant's application to the supreme court of Mississippi for a writ of coram nobis was denied on the ground that since that court had not affirmed the conviction the motion did not lie under this section [Code 1942, § 1992.5], and defendant subsequently sought unsuccessfully to obtain the writ from the justice of the peace who had convicted him, he had exhausted his state court remedy of coram nobis. *Harvey v. State*, 340 F.2d 263 (5th Cir. 1965).

**Cited in:** *Ruff v. State*, 910 So. 2d 1160 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**ALR.** Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Coram nobis on ground of other's confession to crime. 46 A.L.R.4th 468.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial. 50 A.L.R.4th 995.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from

criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Availability of discovery at probation revocation hearings. 52 A.L.R.5th 559.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-7. Filing motion in trial court; filing motion to proceed in trial court with supreme court.

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the justices of the supreme court of Mississippi, convened for said purpose either in term-time or in vacation, and an order granted allowing

the filing of such motion in the trial court. The procedure governing applications to the supreme court for leave to file a motion under this article shall be as provided in Section 99-39-27.

**SOURCES:** Laws, 1984, ch. 378, § 4, eff from and after passage (approved April 17, 1984).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to “this chapter” was changed to “this article.” The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Cross References** — Need to name state as respondent in motion for application to proceed, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Proper courts.
3. Habeas corpus.
4. Ineffective assistance of counsel.
5. Exclusion of blacks from jury.

### 1. In general.

Post-conviction relief motion must be filed as an original civil action. *Cook v. State*, 921 So. 2d 1282 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's petition for post-conviction relief as the supreme court had never granted the inmate leave to file his motion for relief. *Chatman v. State*, 936 So. 2d 375 (Miss. Ct. App. 2006), cert. denied, 936 So. 2d 367 (Miss. 2006).

Although the inmate did not explicitly file a motion for post-conviction relief when he filed his motion to clarify his sentence, the motion addressed what the inmate believed was an illegal sentence, thus, the appellate court treated the motion as a denial of post-conviction relief. *Fuller v. State*, 914 So. 2d 1230 (Miss. Ct. App. 2005).

Issues raised in defendant's second motion for post-conviction collateral relief (PCR) under consideration were essentially the same as were considered by the courts in the his first PCR and appeal. Thus, his claims were procedurally barred based on the successive writ bar and res judicata; in addition, his second PCR motion was filed more than 10 years after his

initial guilty plea and was procedurally barred, and because he filed his second PCR motion in the circuit court without first filing a motion with the supreme court for leave to file in the circuit court the trial court was without jurisdiction to consider said motion. *Sykes v. State*, 919 So. 2d 1064 (Miss. Ct. App. 2005).

Where an inmate never obtained permission from the highest state appellate court to file a post-conviction relief motion with respect to his 1993 convictions, the intermediate appellate court had no jurisdiction to address his allegations regarding those convictions in an appeal from a trial court's denial of his motion for post-conviction relief. *Torns v. State*, 866 So. 2d 486 (Miss. Ct. App. 2003).

Where defendant's conviction and sentence had been affirmed on direct appeal, it was necessary for him to secure permission from the Mississippi Supreme Court in order to pursue a motion for post-conviction relief, assuming that it was proper to treat the letter request as a motion for post-conviction relief; nothing showed that permission was either sought or granted. *Cox v. State*, 856 So. 2d 679 (Miss. Ct. App. 2003).

The statutory mandate that a defendant who has had his case affirmed on appeal must obtain permission from the supreme court to seek post-conviction relief from the trial court is not merely advisory, but jurisdictional. *Doss v. State*, 757 So. 2d 1016 (Miss. Ct. App. 2000).

The rule that the death of a defendant

who has perfected his or her right to appeal does not render the appeal moot applies to petitions for rehearing or when a defendant dies pending appeal from a denial of post-conviction relief; however, if a defendant dies pending application to the Supreme Court for leave to proceed in trial court on post-conviction relief grounds, the application will be deemed moot and the conviction will remain intact. *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

A defendant did not cause a "conviction and sentence" to be appealed to the Supreme Court, as required by this section, where his original, underlying conviction and sentence resulted from a guilty plea, and therefore there could be no appeal to the Supreme Court. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

Under this section and § 99-39-25, there are only 2 instances in which the Supreme Court can entertain a post-conviction motion. One is where the matter is presented originally to the trial court and thereafter appealed to the Supreme Court pursuant to § 99-39-25. The other is where the prisoner is required to first seek leave of the Supreme Court to proceed in the lower court. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

Question of whether admission at trial of tape recorded statements taken from defendant outside presence of counsel violated Sixth Amendment rights was res judicata and barred from relitigation because defendant's conviction of murder became final when Fifth Circuit upheld his conviction and he did not petition United States Supreme Court to review that decision. *Jordan v. State*, 518 So. 2d 1186 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).

## 2. Proper courts.

Even though a court where a conviction was obtained had exclusive jurisdiction over a motion for post-conviction relief, an appellate court considered three motions because the Mississippi Supreme Court had ruled that a trial court's dismissal encompassed all three motions. *Garlotte v. State*, 915 So. 2d 460 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2005).

Since the dismissal of defendant's appeal was a final judgment, Miss. Code

Ann. § 99-39-7 required that he file his motion for post-conviction relief in the Mississippi Supreme Court, seeking permission to file in the trial court. Since he did not follow proper court procedure, the trial court properly denied his motion. *Lyons v. State*, 881 So. 2d 373 (Miss. Ct. App. 2004).

Circuit court was correct in dismissing defendant's post-conviction relief petition since the circuit court of another county, where the conviction was obtained, had exclusive jurisdiction to consider such a claim. *Stanley v. Turner*, 846 So. 2d 279 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

A defendant's post-conviction relief action for a stay of execution of a lower court judgment revoking probation, which was filed in the Supreme Court of Mississippi, would be dismissed without prejudice as having been filed in the wrong court, even though the defendant's previous direct appeal to the Supreme Court seeking review of the probation revocation was dismissed "without prejudice for [the defendant] to institute a post-conviction relief action under § 99-39-5(1)(g)," and thus the Supreme Court was arguably the last court to exercise jurisdiction and should therefore be the court of first resort for the post-conviction petition. For the Supreme Court to acquire exclusive, original jurisdiction over a petition filed under the Post-Conviction Relief Act, the Supreme Court must have previously made some final determination going to the merits of the underlying conviction and sentence; it is not enough that the Supreme Court dismissed an appeal without prejudice for lack of jurisdiction, and that the Supreme Court granted a temporary stay of execution incident to attempted post-conviction proceedings. In order to obtain Supreme Court review, the defendant would be required to file an appropriate petition in the lower court, claiming under § 99-39-5(1)(g) that his probation has been unlawfully revoked, and if dissatisfied with the ruling of that court he could appeal that ruling to the Supreme Court pursuant to § 99-39-25. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

A petition for a writ of habeas corpus was improperly entertained by the trial court in which it was filed because the petition was governed by the provisions of



the Post-Conviction Collateral Relief Act and was therefore subject to the requirement that the petitioner first file a motion in the Supreme Court for permission to proceed in a trial court. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

The Supreme court, rather than a lower court, had jurisdiction over a post-conviction petition where that court had last exercised jurisdiction in the case. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

Trial court has exclusive jurisdiction to hear and determine petition for post-conviction relief filed by convicted defendant who is precluded from taking direct appeal by virtue of having entered guilty plea. *McDonall v. State*, 465 So. 2d 1077 (Miss. 1985).

### 3. Habeas corpus.

Pursuant to Miss. Code Ann. § 99-39-7, a prisoner was required to get permission from the Mississippi Supreme Court to seek post-conviction relief; because the prisoner's application to pursue post-conviction relief was denied, the court of appeals dismissed the prisoner's appeal of the denial of his habeas corpus petition for lack of jurisdiction. *Jackson v. State*, 915 So. 2d 484 (Miss. Ct. App. 2005).

Because a prisoner's manslaughter conviction had been appealed and affirmed, he was required to obtain leave of the Mississippi Supreme Court to file a post-conviction relief motion; where the Supreme Court had refused the prisoner such permission upon concluding that his claims were time-barred, the circuit court was plainly barred from considering the prisoner's attack on his manslaughter conviction. *Ramsey v. State*, 859 So. 2d 1079 (Miss. Ct. App. 2003).

Where defendant's conviction and sentence were affirmed on appeal, defendant was required to get permission to seek postconviction relief from a quorum of supreme court justices, and failure to do

so required dismissal of defendant's appeal of the denial of his petition for post-conviction relief. *Meshell v. State*, 832 So. 2d 1244 (Miss. Ct. App. 2002).

A petition for a writ of habeas corpus was improperly entertained by the trial court in which it was filed because the petition was governed by the provisions of the Post-Conviction Collateral Relief Act and was therefore subject to the requirement that the petitioner first file a motion in the Supreme Court for permission to proceed in a trial court. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

The trial court had exclusive jurisdiction to hear and determine defendant's petition for a writ of habeas corpus following his conviction for business burglary, where defendant's conviction and sentence had not been appealed to the Mississippi Supreme Court for affirmance or dismissal. *McDonall v. State*, 465 So. 2d 1077 (Miss. 1985).

### 4. Ineffective assistance of counsel.

In order to prevail on a claim that counsel's assistance was so defective as to require reversal of conviction or death sentence, defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

### 5. Exclusion of blacks from jury.

A petitioner seeking to vacate or set aside his judgment of conviction and sentence of death could not successfully raise for the first time the issue of exclusion of blacks from the jury where more than 4 years had elapsed since the date the guilty plead had been entered, the sentencing jury impaneled, and the death sentence imposed, and, in the interim, at least 3 different sets of counsel had worked on the case. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.  
**CJS.** 24 C.J.S., Criminal Law §§ 2220-

2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The

"Great Writ" in Mississippi state courts.  
58 Miss. L. J. 25, Spring, 1988.

### § 99-39-9. Requirements of motion and service.

(1) A motion under this article shall name the state of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the prisoner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.

(e) A specific statement of the facts which are not within the prisoner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the prisoner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a prisoner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the prisoner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the prisoner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

(5) The prisoner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under Section 99-39-11(3).

**SOURCES:** Laws, 1984, ch. 378, § 5, eff from and after passage (approved April 17, 1984).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to "this chapter" was changed to "this article." The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Cross References** — Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### JUDICIAL DECISIONS

1. In general.
2. Absence of supporting affidavits.
3. One motion for each judgment.
4. Court error.
5. Procedural bar.

#### 1. In general.

Appellate court only considered one case in a petition for post-conviction relief where defendant filed one motion to cover both a jury trial and a guilty plea to two counts of the sale of cocaine. *Shorter v. State*, 946 So. 2d 815 (Miss. Ct. App. 2007).

Court is not always required to return a post-conviction relief motion that fails to comply with statutory requirements, and therefore a motion that did not contain a concise statement of the statement or grounds upon which the motion was based, as required by Miss. Code Ann. § 99-39-9(1)(c), and did not state a claim upon which relief could have been granted under Miss. Code Ann. § 99-39-5(1), was properly not returned; the determination of whether to return the motion to defendant was left to the trial court since it did not comply with the statutory requirements, and it could not have survived a dismissal under Miss. Code Ann. § 99-39-11(2). *Adams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. Feb. 6, 2007).

Circuit court did not err in refusing to grant defendant's request for designation of the record under Miss. R. App. P. 10(b)(1) where, pursuant to Miss. Code Ann. § 99-39-5, his desire to pursue a civil action was not a ground for relief; the request failed to comply with Miss. Code Ann. § 99-39-9. *Willis v. State*, 950 So. 2d 200 (Miss. Ct. App. 2006).

Defendant failed to provide the appellate court with affidavits of those who would testify to the assertions he made within his brief on appeal, and he failed to provide the appellate court with his own affidavit, as required by statute; the appellate court could only consider those facts that were found in the record, and

could not rely on mere allegations contained within a petitioner's brief. *Barnes v. State*, 937 So. 2d 1006 (Miss. Ct. App. 2006).

Prisoner's allegation of ineffective assistance of counsel lacked the specificity and detail required to establish a prima facie showing under Miss. Code Ann. §§ 99-39-11(2) and 99-39-9(1)(c); although the prisoner alleged that his counsel failed to call any witnesses and failed to subject the prosecution's case to meaningful adversarial testing, the prisoner did not name any witnesses and did not specify any testimony which might have been offered in his favor. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Court refused to consider an affidavit by a social work intern concerning statements supposedly made by a juror because it was not a proper affidavit under Miss. Code Ann. § 99-39-9(1)(e). *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate failed to show, in connection with the inmate's capital murder trial, any prejudicial jury misconduct as alleged in an affidavit submitted under Miss. Code Ann. § 99-39-9(1)(e); while the affidavit stated that some jurors heard that the inmate's co-defendant had committed a rape in the past, there was no allegation that the jurors came to their decision based on a rape allegation against co-defendant. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Jurors were not prohibited, in connection with the sentencing phase of an inmate's capital murder trial, from discussing among themselves whether parole was a possibility because they were instructed correctly; furthermore, the jury knew that if the inmate was sentenced to life, the inmate would never be paroled, and thus little stock could be put in the affidavits, submitted under Miss. Code Ann. § 99-39-9(1)(e), that said that the jurors were concerned that the inmate would be paroled one day. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).



Court rejected the State's argument that the inmate failed to comply with the requirements of Miss. Code Ann. § 99-39-11(3); (1) first, the court found no requirement of verification in the statute, and (2) while verification of the motion to vacate death sentence was required by Miss. Code Ann. § 99-39-9(3), and absent substantial compliance with Miss. Code Ann. § 99-39-9(4), a prisoner faced possible dismissal of an application, the court found nothing to be gained in this instance in returning the inmate's motion and application filed under Miss. Code Ann. § 99-39-27 for verification. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

Petitioner was not entitled to postconviction relief upon asserting that the plea made was involuntary where the trial court questioned petitioner, in compliance with Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A), and petitioner responded that: (1) petitioner had fully discussed the case with counsel, including the elements of the offense and any possible defenses, (2) petitioner was satisfied with the services rendered by counsel, (3) petitioner understood the specific rights available and that a guilty plea waived those rights, and (4) petitioner had committed the charged offense. Petitioner's assertion of incorrect advice as to parole eligibility was inconsistent and conclusory and did not suffice as an ineffective assistance claim. *Sutton v. State*, 873 So. 2d 120 (Miss. Ct. App. 2004).

Defendant would not be successful on an appeal strictly for postconviction relief because his motion did not technically comply with the requirements of the pleading since there was not a separate statement of facts of which defendant had knowledge, and there was no separate statement of facts which defendant asserted but did not himself have knowledge of, and how they could be proven; the judge could have refused to hear defendant's motion because of its noncompliance. *Carr v. State*, 881 So. 2d 261 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's letter request to the trial court concerning possible sentencing credits did not comport with the procedural requirements of Miss. Code Ann. § 99-

39-9. *Cox v. State*, 856 So. 2d 679 (Miss. Ct. App. 2003).

Trial court acted properly in dismissing defendant's motion for postconviction relief raising claims of ineffective assistance of counsel, that the indictment charging defendant with automobile burglary and escape was defective, and that the statutes under which defendant was charged, convicted, and sentenced were unconstitutional, where the claims were general in nature and were unsupported by evidence; trial court was not required to conduct an evidentiary hearing. *Spearman v. State*, 840 So. 2d 823 (Miss. Ct. App. 2003).

Where, as part of guilty plea, defendant admitted committing the essential elements of the crime, defendant waived any challenge to indictment as defective for stating the wrong date on which the offense was committed. *Shinall v. State*, 832 So. 2d 1291 (Miss. Ct. App. 2002).

Defendant's claims in a motion for postconviction relief that he was denied effective assistance of counsel in pleading guilty to two counts of transferring cocaine were insufficiently pled where defendant did not allege how his attorney had coerced him into pleading guilty, misrepresented the facts of his case, had been unprepared for trial, and had conspired with the State to cover up the fact that he was not prepared. *Terry v. State*, 839 So. 2d 543 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in dismissing defendant's motion for postconviction relief from conviction of capital murder and conspiracy without holding an evidentiary hearing as defendant's motion did not present any facts showing that defendant had received ineffective assistance of counsel in entering guilty pleas. *Porter v. State*, 824 So. 2d 650 (Miss. Ct. App. 2002).

A motion for postconviction relief must contain a concise statement of the claims or grounds upon which the motion is based. *Eaton v. State*, 817 So. 2d 630 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in denying defendant's motion for postconviction relief from his conviction for escape without a hearing where defendant's motion did not allege facts showing defen-

dant was entitled to relief. *Knichel v. State*, 824 So. 2d 659 (Miss. Ct. App. 2002).

A motion for post-conviction relief was insufficient to meet the requirements of the statute where, with regard to his claim of ineffective assistance of counsel, defendant merely asserted that he was "mislead, misinformed and misrepresented in this matter," but did not allege with any specificity how defense counsel misinformed him. *Kinney v. State*, 737 So. 2d 1038 (Miss. Ct. App. 1999).

Petitioner's post-conviction claim that he received ineffective assistance of counsel when pleading guilty to felony jail escape was deficient and properly dismissed without evidentiary hearing, where petitioner's affidavit did not track statutory requirements for supporting affidavit and was sole evidentiary support for claim, he presented no other evidence that he escaped from work detail instead of jail, and he did not state how his attorney's performance, in relating state's offer to drop aggravated assault charge in return for guilty plea, was deficient. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

A defendant's post-conviction claim of ineffective assistance of counsel, which was based on allegations that the defendant's counsel failed to object to allegedly defective indictments and erroneously advised the defendant to plead guilty, was properly dismissed without the benefit of an evidentiary hearing because it was manifestly without merit where the defendant failed to allege with the "specificity and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense, the facts alleged and the brief submitted were not supported by any affidavits other than his own, the indictments were not defective and therefore the defendant's counsel could not be faulted for failing to challenge their validity, and the defendant failed to identify the "deficient and erroneous advice" of his counsel that allegedly resulted in his pleas of guilty. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

Motion for post-conviction relief to vacate conviction and sentence for murder on grounds of ineffective assistance of

counsel was denied where petitioner failed to meet the statutory requirement of furnishing affidavits in support of his allegations. *Smith v. State*, 490 So. 2d 860 (Miss. 1986).

## 2. Absence of supporting affidavits.

Denial of a petition for post-conviction relief based on a guilty plea to the charge of manslaughter was not overturned on appeal due to defendant's insufficient brief, failure to cite authority, insufficient record, and lack of affidavits, in violation of Miss. Code Ann. § 99-39-9(1)(e) and Miss. R. App. P. 28(a)(6). *Hill v. State*, 940 So. 2d 972 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief substantially complied with Miss. Code Ann. § 99-39-9 even though the motion did not contain a sworn statement of facts. *Ford v. State*, 911 So. 2d 1007 (Miss. Ct. App. 2005).

Where appellant failed to include supporting affidavits, documents, and records to prove the facts in his petition for post-conviction relief, the circuit court found that the petition did not meet the requirements of Miss. Code Ann. § 99-39-9. Therefore, the summary dismissal of the petition was proper. *Winston v. State*, 893 So. 2d 274 (Miss. Ct. App. 2005).

Appellant's claim that she had received ineffective assistance of counsel because her counsel failed to summon two mental health professionals who would have testified on appellant's behalf during her sentencing on her conviction of two counts of arson lacked evidentiary support as required under Miss. Code Ann. § 99-39-9, where her petition for postconviction relief failed to incorporate an affidavit attesting to facts outside of appellant's personal knowledge. Consequently, appellant failed to meet the statutory requirement for postconviction relief motions. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

Where an inmate failed to include in his petition for postconviction relief the copies of the letters from co-defendants that purportedly exonerated him from the crimes to which he had pleaded guilty, the denial of the inmate's petition for postconviction relief was affirmed. *Donnelly v. State*, 887 So. 2d 833 (Miss. Ct. App. 2004).



Appellant's claim that her sentencing was based on perjured testimony provided by the victims lacked evidentiary support as required under Miss. Code Ann. § 99-39-9 (Supp.) where appellant's petition for postconviction relief did not incorporate an affidavit attesting to facts outside appellant's personal knowledge. Appellant's allegations that she did not know what the victims told the judge during sentencing but that she knew that they would tell the judge lies did not warrant an evidentiary hearing. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

Where an inmate offered no proof that an attorney failed to conduct an investigation, did not file certain motions, and encouraged him to plead guilty to manslaughter, a claim of ineffective assistance of counsel was properly denied in a motion seeking postconviction relief. *Young v. State*, 877 So. 2d 552 (Miss. Ct. App. 2004).

Defendant failed to show how his trial counsel's failure to call certain alibi witnesses was ineffective representation as the inmate failed to identify by the name the witnesses that were to be called and affidavits of what the witnesses would state. *Bell v. State*, 879 So. 2d 423 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Inmate's postconviction relief petition was properly denied because the inmate did not produce affidavits to show that defense counsel had failed to investigate two drug charges and to interview witnesses in the case before advising the inmate to plead guilty; moreover, the inmate had given a sworn statement contradicting these complaints at the plea hearing. *Steen v. State*, 868 So. 2d 1038 (Miss. Ct. App. 2004).

Petitioner failed to furnish affidavits or show cause why he could not furnish affidavits to support his claims that he was shackled in front of the jury, as required by Miss. Code Ann. §§ 99-39-9(1)(e) and 11-1-1; although the petitioner referred to statements as "affidavits," they had not been notarized before any official. *Wilcher v. State*, 863 So. 2d 719 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

Inmate failed to demonstrate that he was deprived effective assistance of coun-

sel by his attorney's failure to effectively subpoena a witness to trial as the inmate did not provide in his petition an affidavit of what the witness's proposed testimony would be. *Jefferson v. State*, 855 So. 2d 1012 (Miss. Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant testified under oath that he understood what he was doing and that his mind was clear, and, additionally, he did not produce any supporting affidavits to the appellate court to establish his alleged mental deficiency, as required by Miss. Code Ann. § 99-39-9(e); thus, the trial judge did not abuse her discretion in not ordering, upon her own motion, a psychiatric evaluation of defendant pursuant to Miss. Code Ann. § 99-13-11 because she determined that the accused was competent to understand the nature of the charges as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(4)(a) and defendant's motion for post-conviction relief was denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

Petitioner failed to attach an affidavit stating that counsel told him that the prosecutor and the judge agreed that he would not have to register as a sex offender, as required by Miss. Code Ann. § 99-39-9(1)(e). *Payton v. State*, 845 So. 2d 713 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003), cert. denied, 540 U.S. 1078, 124 S. Ct. 931, 157 L. Ed. 2d 751 (2003).

Defendant was unsuccessful in his petition for postconviction relief based on an alleged ineffective assistance of trial counsel because he failed to produce affidavits, other than his own, in support of his allegations. *Newson v. State*, 816 So. 2d 1035 (Miss. Ct. App. 2002).

A motion for postconviction relief was inadequate where it did not include an affidavit, or the names of anticipated witnesses, or the substance of their testimony. *Laushaw v. State*, 791 So. 2d 854 (Miss. Ct. App. 2001).

Motions for postconviction relief were required to be pled with specificity and to include affidavits that stated facts and how or by whom those facts would be proven. *Banks v. State*, 796 So. 2d 291 (Miss. Ct. App. 2001).



A claim by the defendant that he was coerced to plead guilty by his trial counsel was insufficient to entitle him to a hearing where he filed no affidavit on specific acts of coercion by his counsel. *Cockrell v. State*, 811 So. 2d 305 (Miss. Ct. App. 2001).

The fact that no affidavits are submitted with a prisoner's postconviction relief motion does not in and of itself render the motion invalid. *Lewis v. State*, 776 So. 2d 679 (Miss. 2000).

Where the defendant failed to produce any documentation corroborating his claim or show good cause as to why documentation could not be obtained, the circuit court properly denied his motion for postconviction relief. *Tate v. State*, 767 So. 2d 1045 (Miss. Ct. App. 2000).

The defendant failed to comply with subsection (1)(e) in connection with his petition for postconviction relief where he failed to submit any additional affidavits and failed to instruct the trial court of how or by whom he would prove the facts on which he based his claim of ineffective assistance of counsel. *Anderson v. State*, 766 So. 2d 133 (Miss. Ct. App. 2000).

The trial court properly denied postconviction relief where the motion for relief did not contain an affidavit or the names of anticipated witnesses or the substance of their testimony, no affidavits were submitted by the anticipated witnesses, and the petitioner provided only general, rather than specific, statements in his motion. *Cooley v. State*, 765 So. 2d 614 (Miss. Ct. App. 2000).

Where facts alleged in appellant's petition and brief were not supported by any affidavits of testifying witnesses, the petition was properly dismissed. *Walton v. State*, 752 So. 2d 452 (Miss. Ct. App. 1999).

A motion for post-conviction relief is not properly denied based solely on the fact that there are no supporting affidavits; if there are no witnesses to the allegations asserted by the appellant, there is no requirement for supporting affidavits. Instead, the appellant may attest to the facts that he intends to prove through his petition. *Ford v. State*, 708 So. 2d 73 (Miss. 1998).

### 3. One motion for each judgment.

Even though defendant was technically required to file different motions for post-conviction relief for separate judgments, an appellate court proceeded to hear issues from two interrelated cases; defendant's sentencing hearing on one case was also a plea hearing in a different case. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

Petitioner's appeal of an order denying his motion for post-conviction relief was dismissed without prejudice where the judgments against him were separate convictions carrying separate sentences; under Miss. Code Ann. § 99-39-9(2), petitioner was unable to collaterally attack all of the judgments against him in one motion for post-conviction relief. *McCoy v. State*, 941 So. 2d 879 (Miss. Ct. App. 2006).

Because separate judgments were rendered in three causes, defendant was procedurally barred, pursuant to Miss. Code Ann. § 99-39-9(2), from challenging the validity of his guilty pleas to two charges in his motion for post-conviction relief where the motion only concerned his conviction by a jury for possession of marijuana. *Hargrove v. State*, 937 So. 2d 29 (Miss. Ct. App. 2006).

Even if defendant may challenge both sentences arising from two different convictions, he would need to file two motions for post-conviction relief. *Burns v. State*, 933 So. 2d 329 (Miss. Ct. App. 2006).

Where a trial court entered two separate judgments, on two separate dates, for the two charges that an appellant pled guilty to at her plea hearing, the appellant could not collaterally attack both judgments in the same motion for post-conviction relief. *Smith v. State*, 919 So. 2d 989 (Miss. Ct. App. 2005).

In a case where petitioner sought post-conviction relief after his probation had been revoked, his second and third assignments of error had to be dismissed because petitioner challenged two counts of which he was convicted in the same petition, as the second and third assignments of error addressed the validity of the judgment entered against him pursuant to his guilty plea of receiving stolen property. *Newsom v. State*, 904 So. 2d 1095 (Miss. Ct. App. 2004).

Miss. Code Ann. § 99-39-9(2) limited postconviction relief review to a single judgment, requiring defendant to file one postconviction relief motion for each challenged judgment. *Readus v. State*, 837 So. 2d 209 (Miss. Ct. App. 2003).

Defendant's petition for postconviction relief was properly denied where he challenged his guilty plea to three drug counts in one petition. By statute, defendant could only challenge one count in one petition. Miss. Code Ann. § 99-39-9(2). *Shaw v. State*, 803 So. 2d 1282 (Miss. Ct. App. 2002).

#### 4. Court error.

Defendant's amended motion and memorandum of law contained sworn, specific allegations of fact that attacked his cocaine sales conviction, as required by Miss. Code Ann. § 99-39-9(1)(d); the lower court erred in finding that defendant failed to allege flaws in his cocaine sales conviction because he clearly did so in his motion and memorandum of law, such that the appellate court proceeded to the merits of defendant's arguments concerning his cocaine sales plea. *Thomas v. State*, 881 So. 2d 912 (Miss. Ct. App. 2004).

Trial court erred by summarily dismissing defendant's postconviction relief motion where it and an accompanying affidavit of his mother raised an issue as to the

voluntariness of his guilty plea due to incorrect legal advice regarding the length of his sentence and whether he had received ineffective assistance of counsel. *Readus v. State*, 837 So. 2d 209 (Miss. Ct. App. 2003).

#### 5. Procedural bar.

Defendant's motion for post-conviction relief (PCR) could attack only one of the judgments; since defendant's armed robbery conviction was without the possibility of parole, trusty time, or earned time, and was the more onerous of the two convictions, defendant's PCR was limited to the assertion of relief against his judgment of convictions of Count II, armed robbery. *Adams v. State*, 954 So. 2d 1051 (Miss. Ct. App. 2007).

Defendant's sentence after pleading guilty to one count of sale of a controlled substance and one count of conspiracy was proper where his sentence was only one-fifth of the maximum permitted, Miss. Code Ann. §§ 41-29-139(b)(1), 97-1-1(h); further, he failed to object to the sentence imposed upon him by the trial court and was attempting to attack his conspiracy and sale convictions in one post-conviction filing that was not permitted, Miss. Code Ann. § 99-39-9(2), therefore, his claim was not properly presented and was procedurally barred. *McMinn v. State*, 867 So. 2d 268 (Miss. Ct. App. 2004).

### RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** 1987 Mississippi Su-

preme Court Review, Post conviction relief. 57 Miss. L. J. 524, August, 1987.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 99-39-11. Judicial examination of original motion; dismissal; filing answer.

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

**SOURCES:** Laws, 1984, ch. 378, § 6; Laws, 1995, ch. 566, § 4, eff from and after July 1, 1995.

**Cross References** — Filing of motion for collateral relief and answer to motion, see § 99-39-9.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### JUDICIAL DECISIONS

1. In general.
2. Ineffective assistance of counsel.
3. Involuntariness of guilty plea.
4. Defendant's mistaken belief.
5. Defective indictment.
6. Evidentiary hearing.
7. Answer.
8. Sentencing.
9. Jurisdiction.
10. Disqualification and recusal.
11. Timeliness of motion.

#### 1. In general.

Court is not always required to return a post-conviction relief motion that fails to comply with statutory requirements, and therefore a motion that did not contain a concise statement of the statement or grounds upon which the motion was based, as required by Miss. Code Ann. § 99-39-9(1)(c), and did not state a claim upon which relief could have been granted under Miss. Code Ann. § 99-39-5(1), was properly not returned; the determination of whether to return the motion to defendant was left to the trial court since it did not comply with the statutory requirements, and it could not have survived a dismissal under Miss. Code Ann. § 99-39-11(2). *Adams v. State*, — So. 2d —, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. Feb. 6, 2007).

Trial court did not err in summarily dismissing an inmate's petition as it was

time-barred and was a successive petition. *Gatlin v. State*, 932 So. 2d 67 (Miss. Ct. App. 2006).

Trial court's denial of the inmate's motion for post-conviction relief without a hearing was affirmed, on different grounds, because the inmate's claims were without merit; the inmate waived all non-jurisdictional defects to the indictment when he entered a plea of guilty and the inmate needed to address issues of sentencing credit through the prison administration system. *Melton v. State*, 930 So. 2d 452 (Miss. Ct. App. 2006).

Both defendant's application for leave to file a motion for post-conviction relief, attacking his rape conviction and sentence, in 2001 (denied by the Mississippi Supreme Court), and his motion for post-conviction relief in 2002 (which raised the issue of his parole eligibility), attacked the same conviction and sentence. Thus, his subsequent motion for post-conviction relief was barred as a successive writ under Miss. Code Ann. § 99-39-27(9); in addition, in its order denying his prior application, the Mississippi Supreme court had stated that defendant's sentence was to be interpreted in accordance with the governing laws at the time his crime was committed, and again, his later motion for post-conviction relief attacked the same sentence and was a successive writ. *Bynum v. State*, 916 So. 2d 534 (Miss. Ct. App. 2005).



Per Miss. Code Ann. § 47-7-37, the circuit court had the statutory authority to revoke defendant's post-release supervision when he sold cocaine to an agent while on release. There was no error where the circuit court reinstated his five year suspended sentence; further, per the bench warrant upon which defendant was arrested, and the summons setting the revocation hearing, hand delivered to defendant, he had notice of the revocation hearing and he was not denied due process or entitled to post-conviction relief. *Rucker v. State*, 909 So. 2d 137 (Miss. Ct. App. 2005).

Defendant's argument that his plea was involuntarily and unintelligently entered because he was only 16 years of age when it was entered, his parents were not present at the court proceedings, and he had been misled as to the length of the sentence he would receive if he pled guilty, was rejected. The circuit court had original jurisdiction since defendant was charged with armed robbery, and being properly before the circuit court, his age did not prevent him from entering a valid plea of guilty without parental accompaniment; the record showed defendant responded in the affirmative that he understood there was no minimum sentence, but that the maximum sentence for armed robbery was life in prison, and his motion for post-conviction relief was properly denied. *Haynes v. State*, 906 So. 2d 762 (Miss. Ct. App. 2004).

Defendant's "letter of hope" to the trial judge did not constitute a first motion for post-conviction relief, in part, because it was never answered or denied. Nevertheless, the trial court's other grounds for denying defendant's motion were valid, since defendant's request for a reduction in his sentence could have been brought before the trial court at trial or on direct appeal, and therefore he waived the issue; secondly, the trial judge reviewed the record, found that defendant had openly admitted his guilt at the plea proceeding, and found that his motion was meritless as defendant had made the strategic gamble of refusing the more lenient plea agreement that had been offered. *Spencer v. State*, 907 So. 2d 353 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2005).

Defendant was properly denied postconviction relief pursuant to Miss. Code Ann. § 99-39-11(2) after defendant's probation was revoked because nowhere in the probation revocation hearing did defendant indicate that defendant did not have proper notice of the hearing or that defendant was not aware of the specific grounds for the revocation of probation. *Mathis v. State*, 882 So. 2d 798 (Miss. Ct. App. 2004).

Defendant's motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2) was properly denied where defendant's violation of the condition of his suspended sentence occurred within the five-year implied period of probation, Miss. Code Ann. § 47-7-37; defendant understood the simple and clear condition that he was not to violate any laws of any city or state or of the United States. *McCaine v. State*, 879 So. 2d 1114 (Miss. Ct. App. 2004).

Trial court was not required to cite case authority or case law in denying defendant's postconviction motion without an evidentiary hearing, and summary dismissal was appropriate where it was clear from defendant's sentence, that as a convicted felon, defendant was in fact eligible to receive post-release supervision and subject to same. *Hunt v. State*, 874 So. 2d 448 (Miss. Ct. App. 2004).

Court rejected the State's argument that the inmate failed to comply with the requirements of Miss. Code Ann. § 99-39-11(3); (1) first, the court found no requirement of verification in the statute, and (2) while verification of the motion to vacate death sentence was required by Miss. Code Ann. § 99-39-9(3), and absent substantial compliance with Miss. Code Ann. § 99-39-9(4), a prisoner faced possible dismissal of an application, the court found nothing to be gained in this instance in returning the inmate's motion and application filed under Miss. Code Ann. § 99-39-27 for verification. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

Court finds no requirement of verification in Miss. Code Ann. § 99-39-11(3). *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

In considering post-conviction relief motions, trial judges are entitled to rely upon

sworn statements made by defendants during their plea qualification hearings. *Graves v. State*, 872 So. 2d 760 (Miss. Ct. App. 2004).

Defendant's mere assertion of a constitutional right violation was not sufficient to overcome the time bar of Miss. Code Ann. § 99-39-5. There had to at least appear to be some basis for the truth of the claim, or merit to the claim, before the limitation period would be waived and dismissal avoided pursuant to Miss. Code Ann. § 99-39-11(2). *Stovall v. State*, 873 So. 2d 1056 (Miss. Ct. App. 2004).

In making his findings on an inmate's postconviction relief (PCR) motion, the trial judge, pursuant to Miss. Code Ann. § 99-39-11, properly took judicial notice of his own docket and the prior proceedings had and conducted in both the criminal proceedings forming the basis of the attack via the civil PCR motion, as well as all proceedings had and conducted in the civil matter related to the PCR motion. *Gulley v. State*, 870 So. 2d 652 (Miss. 2004).

Trial court properly denied the capital murder defendant's motion for a new trial because there was sufficient evidence to support the underlying charge of attempted rape against the defendant, the State's evidence concerning the underlying charge was not based upon circumstantial evidence, and the defendant's claims that he received ineffective assistance of counsel at his trial were without merit. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

Defendant failed to provide proof to support his post-conviction relief claim where the trial judge determined that the petition for post-conviction collateral relief had no merit, after having reviewed the affidavits and the record. *Hill v. State*, 850 So. 2d 223 (Miss. Ct. App. 2003).

Defendant's claims in a motion for post-conviction relief that he was denied effective assistance of counsel in pleading guilty to two counts of transferring cocaine were insufficiently pled where defendant did not allege how his attorney had coerced him into pleading guilty, misrepresented the facts of his case, had been unprepared for trial, and had conspired

with the State to cover up the fact that he was not prepared. *Terry v. State*, 839 So. 2d 543 (Miss. Ct. App. 2002).

Under subsection (2), dismissal was appropriate where it appeared beyond a doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief; court did not have an obligation to render factual findings. *Culbert v. State*, 800 So. 2d 546 (Miss. Ct. App. 2001).

There was no error where the court considered the responses made by the State relative to the motions and petitions filed by defendant in three separate orders addressing and denying the request for petition for guilty plea, postconviction collateral relief, and reduction of sentence. *Walton v. State*, 752 So. 2d 452 (Miss. Ct. App. 1999).

A trial judge was disqualified from ruling on a criminal defendant's postconviction motion where he was the district attorney at the time the criminal information against the defendant was filed, and therefore he should have recused himself initially rather than attempting to recuse himself after his ruling on the postconviction motion was appealed; moreover, the judge erred by participating in selecting his replacement and not following the mandates of § 9-1-105(1). *Banana v. State*, 638 So. 2d 1329 (Miss. 1994).

Convict whose numerous appeals, petitions, and motions had been unanimously rejected by Supreme Court, may be denied leave to proceed in forma pauperis on new petition or any further petitions for extraordinary writs. *In re McDonald*, 489 U.S. 180, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989).

## 2. Ineffective assistance of counsel.

Dismissal of a petition for post-conviction relief was reversed and remanded for an evidentiary hearing because defendant made a prima facie showing that his attorney was deficient in recommending a plea to a weapons charge since there was no probable cause to stop a car where one taillight was working under Miss. Code Ann. § 63-7-13; however, there was no ineffective assistance of counsel shown based on a failure to explain an Alford plea or the failure to investigate. *Moore v.*



State, — So. 2d —, 2007 Miss. App. LEXIS 242 (Miss. Ct. App. Apr. 17, 2007).

Defendant's motion for post-conviction relief, filed after he pled guilty to two counts of murder was properly dismissed without a hearing pursuant to Miss. Code Ann. § 99-39-11(2) where counsel's advice that a trial could result in a guilty verdict and the death penalty did not support an argument of ineffectiveness; counsel had a duty to inform defendant of the possible outcomes of conviction. *Booker v. State*, 954 So. 2d 448 (Miss. Ct. App. 2006).

Trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying petitioner an evidentiary hearing on his post-conviction petition because there was no evidence in the record other than his bald assertions that counsel performed inadequately; he did not demonstrate that his counsel failed to perform at the constitutional minimum. *Knight v. State*, — So. 2d —, 2006 Miss. App. LEXIS 808 (Miss. Ct. App. Oct. 31, 2006).

Where defendant was charged with aggravated assault and possession of a firearm by a felon, his attorney told him that he would receive life without parole if he went to trial; defendant then entered a plea of guilty to aggravated assault. Because his attorney's advice was correct, defendant was afforded effective assistance of counsel; he was not entitled to post-conviction relief. *Brewer v. State*, 920 So. 2d 546 (Miss. Ct. App. 2006).

Appellant's guilty plea to possession of a controlled substance with intent to distribute effectively waived all of the allegations in his motion for post-conviction relief; and he failed to offer proof to support his ineffective assistance of counsel claim. The post-conviction court properly denied his motion without a hearing. *Buckhalter v. State*, 912 So. 2d 159 (Miss. Ct. App. 2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel where the issues were not pled with specificity. *Kelley v. State*, 913 So. 2d 379 (Miss. Ct. App. 2005).

Prisoner's allegation of ineffective assistance of counsel lacked the specificity and detail required to establish a prima facie showing under Miss. Code Ann. §§ 99-39-

11(2) and 99-39-9(1)(c); although the prisoner alleged that his counsel failed to call any witnesses and failed to subject the prosecution's case to meaningful adversarial testing, the prisoner did not name any witnesses and did not specify any testimony which might have been offered in his favor. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Denial of the inmate's petition for post-conviction relief was proper where he offered no proof that his defense counsel had been ineffective and failed to present his claims with any specificity as required by Miss. Code Ann. § 99-39-11(2). *Puckett v. State*, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

Defendant was not entitled to a free transcript in a post-conviction relief setting because his post-conviction motion could not withstand summary dismissal under Miss. Code Ann. § 99-39-11(2); defendant did not demonstrate ineffective assistance of counsel where he did not allege with any degree of specificity what constituted the mitigating evidence or the manner in which his counsel coerced him, and such naked allegations did not supply the "specificity and detail" required to establish a prima facie showing. *McCray v. State*, 869 So. 2d 442 (Miss. Ct. App. 2004).

Defendant failed to meet his burden of proof regarding the allegation of ineffective assistance of counsel where his assertion that his attorney put up "no defense" during closing arguments other than to say "my client says he's innocent" was completely false; counsel said more in closing argument than defendant asserted and defendant did not show that counsel's performance was deficient. *Armstead v. State*, 869 So. 2d 1052 (Miss. Ct. App. 2004).

No support existed for the defendant's post-conviction claim that he was denied the effective assistance of counsel due to his counsel's failure to fully investigate the facts of the defendant's case and explore the possibility that various purported witnesses could have provided evidence tending to absolve the defendant from guilt; the defendant failed to show



that any witnesses who could exonerate him existed and that the unavailability of potentially favorable witnesses was due to the defense counsel's failure to adequately pursue this avenue of defense. *Davidson v. State*, 850 So. 2d 158 (Miss. Ct. App. 2003).

Defendant failed to meet his statutory burden of proof required to establish a *prima facie* showing, where defendant did not show that counsel's performance was deficient and that he was prejudiced by counsel's mistakes. *Hargett v. State*, 864 So. 2d 283 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Denial of defendant's motion for post-conviction relief was proper and defendant's claim that his attorney was ineffective in that he lied to the trial court, attempted to induce perjured testimony, and gave up on the adversarial process was rejected; defendant failed to support his assertions with any factual basis or supporting affidavits, and his assertions lacked the specificity and detail required to establish a *prima facie* showing under Miss. Code Ann. § 99-39-11(2), and he failed to show that but for his counsel's actions, the results of the trial court would have been different. *Hamlin v. State*, 853 So. 2d 841 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in dismissing defendant's motion for post-conviction relief from conviction of capital murder and conspiracy without holding an evidentiary hearing as defendant's motion did not present any facts showing that defendant had received ineffective assistance of counsel in entering guilty pleas. *Porter v. State*, 824 So. 2d 650 (Miss. Ct. App. 2002).

Trial court did not err in dismissing defendant's motion for post-conviction relief based on ineffective assistance of counsel without an evidentiary hearing as defendant's unsupported allegation that defendant's attorney told defendant that defendant would be sentenced to six years if defendant pleaded guilty to robbery instead of the ten years defendant received was clearly rebutted by the record of the guilty plea hearing. *Jones v. State*, 795 So. 2d 589 (Miss. Ct. App. 2001).

Evidence was insufficient to require the court to hold a hearing to determine the

petitioner's claim of ineffective assistance of counsel and, therefore, the summary denial of the petition for post-conviction relief was proper. *Bell v. State*, 745 So. 2d 492 (Ct. App. 1999).

Allegation by post-conviction petitioner, who had pleaded guilty to charge of capital murder, that he had received ineffective assistance of counsel on basis that his guilty plea was induced by misrepresentations of his attorney was rebutted by transcript of plea hearing and could be summarily denied without hearing; record indicated that petitioner had remained silent both when given opportunity to inform court of terms of alleged "real plea bargain," and also when accomplice received shorter sentence. *Simpson v. State*, 678 So. 2d 712 (Miss. 1996).

*Prima facie* claim must be stated by defendant in post-conviction petition to lower court in order to obtain evidentiary hearing on merits of ineffective assistance of counsel issue. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

Petitioner's post-conviction claim that he received ineffective assistance of counsel when pleading guilty to felony jail escape was deficient and properly dismissed without evidentiary hearing, where petitioner's affidavit did not track statutory requirements for supporting affidavit and was sole evidentiary support for claim, he presented no other evidence that he escaped from work detail instead of jail, and he did not state how his attorney's performance, in relating state's offer to drop aggravated assault charge in return for guilty plea, was deficient. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

A circuit court properly summarily dismissed a defendant's post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel, where a transcript of the plea hearing showed that the trial court fully informed the defendant of the maximum sentence for the crime charged in the indictment and the effect of the habitual criminal statute if he subsequently committed another crime of violence and that the defendant acknowledged to the court that no one had threatened, abused or mistreated him in any way or promised him anything to

cause him to wish to plead guilty, and the defendant did not contend that he lied to the court because of misrepresentations by his attorney. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

### 3. Involuntariness of guilty plea.

Post-conviction relief was denied without an evidentiary hearing where defendant pled guilty to a drug charge because the trial court informed him of the consequences of the plea, despite an attorney's prediction that he would receive less time; moreover, a 34-year sentence was not disproportionate since it was within the limits of Miss. Code Ann. § 41-29-313 and Miss. Code Ann. § 41-29-147. *Bridges v. State*, — So. 2d —, 2007 Miss. App. LEXIS 240 (Miss. Ct. App. Apr. 17, 2007).

Trial court properly dismissed petitioner's postconviction motion without an evidentiary hearing, pursuant to Miss. Code Ann. § 99-39-11(2), where the trial court had complied with Miss. Unif. Cir. & Cty. R. 8.04 and the constitutional requirements for ascertaining that her guilty plea to sexual battery was voluntarily and intelligently entered. *Staggs v. State*, — So. 2d —, 2007 Miss. App. LEXIS 9 (Miss. Ct. App. Jan. 9, 2007).

Appellate court affirmed the summary dismissal of an inmate's motion for post-conviction relief under Miss. Code Ann. § 99-39-11(2) because a claim of new evidence was not relevant when an inmate had pled guilty, and inmate could not establish that his plea was not voluntary. *Majors v. State*, 946 So. 2d 369 (Miss. Ct. App. 2006).

Although appellant alleged that his guilty plea to armed robbery and aggravated assault was not voluntarily and knowingly entered because he was unable to read, the postconviction court did not

err in dismissing his motion for post-conviction relief, as appellant had represented to the trial court at the plea hearing that he could read and write. *Gross v. State*, 954 So. 2d 438 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such a claim of ineffective assistance of counsel failed. *Hull v. State*, 933 So. 2d 315 (Miss. Ct. App. 2006).

Denial of the inmate's motion for post-conviction relief was appropriate because his sworn signature on his plea agreement and testimony during his plea hearing showed that his plea of guilty was voluntary and intelligently given, and as such, the court was unable to say that the circuit court's holding was clearly erroneous. *Ross v. State*, 936 So. 2d 983 (Miss. Ct. App. 2006).

Circuit properly dismissed defendant's motion for post-conviction relief without a hearing where defendant's sworn statements at her plea hearing showed that her plea was voluntary and knowing. *Graves v. State*, 872 So. 2d 760 (Miss. Ct. App. 2004).

Since the record did not include a plea transcript or a plea petition and there was no showing that a trial court had reviewed this evidence to determine whether or not a plea to drug charges had been voluntarily given, the case was reversed for further proceedings. *White v. State*, 867 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant's argument that counsel coerced defendant into pleading guilty was directly contradicted by the record, which showed that the trial judge asked defendant specifically about whether defendant had been coerced or threatened into pleading guilty, and defendant responded in the negative; thus defendant's plea was voluntary, there was no showing that counsel was ineffective, and defendant's petition for post-conviction relief was properly denied. *Roby v. State*, 861 So. 2d 368 (Miss. Ct. App. 2003).



Inmate's motion, alleging an act of duplicity on the part of his defense counsel, was supported by nothing beyond the inmate's own assertion, which was overwhelmingly belied by his own testimony under oath at the plea hearing that his plea was voluntarily made; thus, the trial court acted properly by denying post-conviction relief on the conclusion that the inmate's allegations under oath contradicted his earlier sworn testimony and were, therefore, merely a sham. *Whitfield v. State*, 845 So. 2d 762 (Miss. Ct. App. 2003).

Defendant's plea petition was not an oral statement in open court but a sworn document and similarly to statements in open court, it could be used to discredit defendant's post-plea allegations that defendant's guilty plea was involuntary; thus, in defendant's post-conviction action, the trial judge properly determined that summary dismissal was appropriate and no transcript would be ordered, where the plea petition fully enumerated the rights defendant was waiving and informed defendant of the maximum possible sentence. *Ward v. State*, 879 So. 2d 452 (Miss. Ct. App. 2003), cert. denied, 882 So. 2d 234 (Miss. 2004).

The trial court erred in granting a motion for post-conviction relief where (1) no evidence other than the defendant's own affidavit supported his allegation that he was promised a sentence of no more than seven years in exchange for his guilty plea, and (2) in his petition to plead guilty, the defendant stated that he fully understood the charges against him, that he understood his rights under the Constitution, that he would waive those rights by pleading guilty, and that he understood that the trial judge had sole discretion in sentencing him if he pled guilty. *State v. Santiago*, 773 So. 2d 921 (Miss. 2000).

Defendant was not prejudiced in post-conviction proceeding when trial court refused to grant his request for transcript of hearing in which he pleaded guilty to capital murder, where record was amended to include transcript of plea proceeding, and affidavit in which defendant challenged voluntariness of his plea was inconsistent with transcript. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. *Smith v. State*, 636 So. 2d 1220 (Miss. 1994).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. *Smith v. State*, 636 So. 2d 1220 (Miss. 1994).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a \$1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. *Eley v. State*, 631 So. 2d 787 (Miss. 1994).

A circuit court properly summarily dismissed a defendant's post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel, where a transcript of the plea hearing showed that the trial court fully informed the defendant of the maximum sentence for the crime charged in the indictment and the effect of the habitual criminal statute if he subsequently committed another crime of violence and that the defendant acknowledged to the court that no one had threatened, abused or mistreated him in any way or promised him anything to cause him to wish to plead guilty, and the defendant did not contend that he lied to the court because of misrepresentations by his attorney. *Garlotte v. State*, 597 So. 2d 641 (Miss. 1992).

A circuit court properly summarily denied a defendant's post-conviction relief



motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. *Lott v. State*, 597 So. 2d 627 (Miss. 1992).

A defendant's complaint sufficiently stated a claim for post-conviction relief on the ground that his guilty plea was involuntary, and therefore his complaint should not have been dismissed on its face, where the defendant alleged that his attorney told him that he would receive a sentence of less than 12 years if he entered a guilty plea, and the defendant entered a plea of guilty whereupon he was sentenced to 16 years' imprisonment. Although a mere expectation or hope of a lesser sentence than might be meted out after conviction upon a trial by jury will generally not be sufficient to entitle a defendant to relief in such a case, the assurance of a 12-year cap on his sentence constituted a "firm representation" rather than a "mere expectation" of such a lesser sentence, and therefore provided a basis for relief. *Myers v. State*, 583 So. 2d 174 (Miss. 1991).

#### 4. Defendant's mistaken belief.

Where an inmate pled guilty to murder, but argued that it was a "crime of passion," it was not error to deny the inmate's motion for the production of the transcript of the partial trial because the inmate improperly equated a "crime of passion" with a killing in the heat of passion, and there was nothing to suggest that the victim did anything in the moments prior to death to provoke or arouse sufficient

passion to cause the inmate to kill the victim in a moment of rage. *Lawrence v. State*, — So. 2d —, 2007 Miss. App. LEXIS 366 (Miss. Ct. App. May 29, 2007).

A circuit court's summary denial and dismissal of a defendant's motion for post-conviction collateral relief was not error where the defendant asserted that he entered a guilty plea under the advice and belief that the maximum sentence which could be imposed under the indictment was 20 years so that his 30 year sentence was improper, the maximum sentence which could be imposed under the indictment, which charged the defendant with possession of more than one kilogram of marijuana with intent to distribute and recidivism, was 30 years without parole or probation, and the transcript of the plea colloquy between the trial court judge and the defendant belied the defendant's claim of a 20-year plea bargain. *Turner v. State*, 590 So. 2d 871 (Miss. 1991).

#### 5. Defective indictment.

Inmate's petition for post-conviction was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. *Burch v. State*, 929 So. 2d 394 (Miss. Ct. App. 2006).

Defendant who entered a plea of guilty to aggravated assault was not entitled to a hearing on his petition for post-conviction relief. Indictment alleging that defendant attempted to cause bodily injury to the victim by firing a gun at her, without any legal justification, was sufficient to charge defendant with the crime of aggravated assault. *Brewer v. State*, 920 So. 2d 546 (Miss. Ct. App. 2006).

Where, as part of a guilty plea, defendant admitted committing the essential elements of the crime, defendant waived any challenge to indictment as defective for stating the wrong date on which the offense was committed. *Shinall v. State*, 832 So. 2d 1291 (Miss. Ct. App. 2002).

Allegations that indictments were defective because the record did not identify them as the indictments returned by the appropriate grand jury and because they were not accompanied by the affidavit of the grand jury foreman, involved nonjurisdictional defects which were waived

when the defendant entered a voluntary guilty plea and failed to timely assert his claims in the lower court. Moreover, it was not clear that the defendant would have been entitled to relief even if the claims had been timely asserted because the indictments were signed by the foreman of the grand jury and marked "filed" by the county circuit clerk. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

### 6. Evidentiary hearing.

Trial court committed no error in refusing to grant an appellant an evidentiary hearing on his motion for postconviction relief where based on the record of his guilty plea hearing, it was clear that he was not entitled to any relief. *McNickles v. State*, — So. 2d —, 2007 Miss. App. LEXIS 354 (Miss. Ct. App. May 22, 2007).

Record contained sufficient evidence to warrant an evidentiary hearing in order to determine whether defendant satisfied his obligations with respect to the plea agreement; if the trial court determined that defendant had substantially complied with his obligations under the plea agreement to his detriment, then the trial court was duty bound to sentence him consistent with his bargain, notwithstanding the absence of supporting affidavits. *Callins v. State*, — So. 2d —, 2007 Miss. App. LEXIS 243 (Miss. Ct. App. Apr. 17, 2007).

In a petition for post-conviction relief, the inmate's counsel was not ineffective because he failed to allege ineffective assistance of counsel with enough specificity and the outcome of the proceedings would not have been different because defendant admitted that he was guilty of the crime of statutory rape; thus, under Miss. Code Ann. § 99-39-11(a), the trial court properly dismissed the ineffective assistance of counsel claim without an evidentiary hearing. *Brooks v. State*, 953 So. 2d 291 (Miss. Ct. App. 2007).

Request for post-conviction relief was properly denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) where the record contradicted a claim that counsel mistakenly informed defendant about the charge he was pleading guilty to, a claim of coercion, and a claim of ineffective assistance of counsel; the case number was in the heading of the

document, defendant acknowledged an intent to nolle prosequere a remaining charge, and the parties took notice of this agreement at the plea hearing. *Hoyt v. State*, 952 So. 2d 1016 (Miss. Ct. App. 2007).

Where appellant pled guilty to three counts of armed robbery, he filed a motion for post-conviction relief alleging that his guilty plea was not voluntary and that his trial counsel was ineffective in informing him as to his possible sentence, and he claimed that the sentencing recommendation by the district attorney was later changed to reflect the actual sentence appellant received; appellant's post-conviction relief motion was sufficient to withstand dismissal, and as appellant's claim of ineffective assistance of counsel was directly related to whether he in fact entered his plea voluntarily or involuntarily, this issue required an evidentiary hearing. *Jones v. State*, 949 So. 2d 872 (Miss. Ct. App. 2007).

Defendants were not entitled to an evidentiary hearing on their motions for post-conviction relief where they had no merit. *Holland v. State*, 956 So. 2d 322 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because he failed to show that his attorney persuaded him to plead guilty to sexual battery, assured him that he would be released in three or four years, or failed to obtain a private investigator. *Caldwell v. State*, 953 So. 2d 266 (Miss. Ct. App. 2007).

Petition for post-conviction relief was denied without an evidentiary hearing where a plea was entered to armed robbery because, despite counsel's failure to investigate the type of weapon actually used, no prejudice resulted since an inmate failed to show that he would have proceeded to trial. *Hinton v. State*, 947 So. 2d 979 (Miss. Ct. App. 2006).

Trial court did not err in summarily dismissing appellant's motion for post-conviction relief (PCR) without an evidentiary hearing as the only evidence provided for the PCR was appellant's own allegations that were contradicted by the transcript of the plea hearing. *Smith v. State*, 919 So. 2d 989 (Miss. Ct. App. 2005).



Inmate was not entitled to an evidentiary hearing at his motion for post-conviction relief where it was plainly evident from the face of the motion, annexed exhibits, and the prior proceedings that he was not entitled to any relief. *Epps v. State*, 926 So. 2d 242 (Miss. Ct. App. 2005).

Where appellant failed to include supporting affidavits, documents, and records to prove the facts in his petition for post-conviction relief, the summary dismissal of his petition was proper. *Winston v. State*, 893 So. 2d 274 (Miss. Ct. App. 2005).

Where a trial court properly found that an inmate's petition for post-conviction relief was time barred, there was no genuine issue of material fact to consider that necessitated an evidentiary hearing. *Phillips v. State*, 913 So. 2d 330 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief without a hearing was proper pursuant to Miss. Code Ann. § 99-39-11(2) where he was afforded a thorough plea hearing and where he also voluntarily entered his plea of guilty. The trial judge informed the inmate of both his rights and of the maximum sentence he could have received for the crime of robbery, to which he had pled guilty to. *Sanders v. State*, 900 So. 2d 1213 (Miss. Ct. App. 2005).

In his order the trial judge held that it plainly appeared on the face of the motion and all exhibits and prior proceedings that defendant was not entitled to any relief; moreover, where the trial court was not the court of proper jurisdiction an evidentiary hearing was not necessary, and defendant's claim was properly dismissed. *Lyons v. State*, 881 So. 2d 373 (Miss. Ct. App. 2004).

Where there was no record of what occurred at a plea hearing, and a trial court's order stated that the relevant documents were reviewed before a motion for postconviction relief was denied, no evidentiary hearing was required. *Young v. State*, 877 So. 2d 552 (Miss. Ct. App. 2004).

Circuit court properly dismissed defendant's motion for post-conviction relief without a hearing. The record did not

support her allegations of ineffective assistance of counsel or that her guilty plea was involuntarily and unknowingly made. *Graves v. State*, 872 So. 2d 760 (Miss. Ct. App. 2004).

Petitioner's motion for post-conviction relief was properly dismissed without an evidentiary hearing, because it was clear from the record that petitioner was explicitly informed by the trial judge of his right against self-incrimination, and that a guilty plea would constitute a waiver of that right. *Miller v. State*, 870 So. 2d 667 (Miss. Ct. App. 2004).

Appellate court could not determine conclusively that there was no merit to defendant's assertions regarding lack of adequate notice of the probation revocation hearing; the form offered no evidence that defendant may have voluntarily waived the rights afforded him, such that the trial court erred in summarily denying relief. *Mathis v. State*, — So. 2d —, 2004 Miss. App. LEXIS 369 (Miss. Ct. App. Apr. 27, 2004).

Where the inmate asserted that the transcript of the inmate's post-conviction relief evidentiary hearing was inaccurate and that the inmate was entitled to a new hearing, the trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying the hearing, as there was nothing in the record to support the inmate's claim that the transcript was inaccurate; any problem in the telephone connection for the hearing was solved before the merits of the inmate's motion were raised. *Putnam v. State*, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Under Miss. Code Ann. § 99-39-11(2), a trial court properly was not required to conduct an evidentiary hearing on a prisoner's motion for post-conviction relief, which was filed more than three years after the judgment of conviction, because the trial court no longer had the authority to change the sentence and this fact was apparent from the date stamp affixed to the face of the prisoner's motion. *Brister v. State*, 858 So. 2d 181 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion by refusing to grant an evidentiary hearing on the issue of sentencing in a petition



for post-conviction relief because the evidence showed that an inmate was told the maximum sentence for the crime of manslaughter during a plea hearing. *Hollingsworth v. State*, 852 So. 2d 612 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Defendant's supported allegations that his guilty plea to murdering his girlfriend was involuntary and the result of coercion because his attorney refused to investigate an allegedly incorrect criminal record that would have shown defendant to be a habitual criminal could properly be rejected by the trial court considering defendant's motion for post-conviction relief without holding an evidentiary hearing; trial court could properly impose a life sentence without referring the matter to a jury. *Riley v. State*, 848 So. 2d 888 (Miss. Ct. App. 2003).

Trial court did not err in not considering appellant's amended supplemental brief prior to dismissing his motion for post-conviction collateral relief without an evidentiary hearing, where the trial court's finding that appellant's post-conviction relief request was without merit was supported by substantial credible evidence contained within the record. *Hentz v. State*, 852 So. 2d 70 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Trial court acted properly in dismissing defendant's motion for post-conviction relief raising claims of ineffective assistance of counsel, that the indictment charging defendant with automobile burglary and escape was defective, and that the statutes under which defendant was charged, convicted, and sentenced were unconstitutional, where the claims were general in nature and were unsupported by evidence supporting the claims; trial court was not required to conduct an evidentiary hearing. *Spearman v. State*, 840 So. 2d 823 (Miss. Ct. App. 2003).

Trial court properly denied defendant's motion for post-conviction relief where defendant waived two claims of error by not pursuing the issues in the trial court and defendant's claim of ineffective assistance of counsel in pleading guilty to two counts of armed robbery and accepting concurrent 20-year sentences was without merit because the record reflected that counsel's

incorrect advice was corrected by the trial court before defendant's guilty pleas were accepted. *Donnelly v. State*, 841 So. 2d 207 (Miss. Ct. App. 2003).

Defendant testified at defendant's plea hearing that defendant actively participated in the planning and execution of an armed robbery, the felony underlying the capital murder indictment; the transcript showed a careful inquiry by the trial court into defendant's understanding of defendant's constitutional rights, defendant's desire to waive those rights, and therefore, defendant was not entitled to an evidentiary hearing upon his motion for post-conviction relief. *Bolton v. State*, 831 So. 2d 1184 (Miss. Ct. App. 2002).

In the prisoner's action seeking to have the court award him credits against his sentence that had allegedly been improperly denied by the Mississippi Department of Corrections, after examining the motions, any annexed exhibits, and the prior pleadings in the case, the appellate court found no need for the circuit court to have granted a hearing in the case. *Hill v. State*, 838 So. 2d 994 (Miss. Ct. App. 2002).

Denial of the prisoner's post-conviction relief motion without an evidentiary hearing was proper where the appellate court found there was no defect in the factual basis for the prisoner's guilty plea to uttering a forgery, as the prisoner understood the charge and also signed a petition to enter a guilty plea, agreeing that the attorney had explained the charges. *Moore v. State*, 830 So. 2d 1274 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in denying defendant's motion for post-conviction relief from his conviction for escape without a hearing where defendant's motion did not allege facts showing defendant was entitled to relief. *Knichel v. State*, 824 So. 2d 659 (Miss. Ct. App. 2002).

Trial court did not err in denying defendant's motion for post-conviction relief challenging defendant's guilty plea to possession of cocaine on ten separate grounds where none of the claims made by defendant had any support in the record. *Swift v. State*, 815 So. 2d 1230 (Miss. Ct. App. 2001).

A defendant seeking post-conviction relief pursuant to Miss. Code Ann. § 99-39-11 is obligated to plead and offer sufficient proof of facts that would entitle defendant to an evidentiary hearing. *Andrews v. State*, 791 So. 2d 902 (Miss. Ct. App. 2001).

Trial court did not err in dismissing defendant's motion for post-conviction relief based on ineffective assistance of counsel without an evidentiary hearing as defendant's unsupported allegation that defendant's attorney told defendant that defendant would be sentenced to six years if defendant pleaded guilty to robbery instead of the ten years defendant received was clearly rebutted by the record of the the guilty plea hearing. *Jones v. State*, 795 So. 2d 589 (Miss. Ct. App. 2001).

The trial court improperly refused to grant an evidentiary hearing where an affidavit was presented in which the sole witness supporting one of the charges recanted his testimony. *Hardiman v. State*, 789 So. 2d 814 (Miss. Ct. App. 2001).

The petitioner was not entitled to an evidentiary hearing on his claims of ineffective assistance of counsel where the transcript of his plea hearing completely contradicted each and every allegation on which he based his claims. *Rush v. State*, 811 So. 2d 431 (Miss. Ct. App. 2001).

The defendant's claim that he was improperly denied the right to an evidentiary hearing on his allegation that his sentence was in violation of his plea agreement was without merit where the trial judge reviewed the petition and the plea hearing transcript and chose to rely on the defendant's sworn testimony that he understood the plea process. *Rogers v. State*, 811 So. 2d 367 (Miss. Ct. App. 2001).

The trial court did not err in denying the defendant an evidentiary hearing based on his claim of ineffective assistance of counsel, notwithstanding the submission of a letter from the defendant's attorney stating his erroneous belief that the defendant would be released in only five years, one-fourth of his 20-year sentence, as any wrongful advice given to the defendant concerning his possible sen-

tence was cured by the trial judge's unambiguous explanation during the plea hearing that the defendant would be required to serve at least eight years of his 20-year sentence. *Richardson v. State*, 769 So. 2d 230 (Miss. Ct. App. 2000).

The trial court did not abuse its discretion in denying an evidentiary hearing on a motion for post-conviction relief since the defendant failed to provide supporting evidence to warrant an evidentiary hearing and his assertions, standing alone, were insufficient to warrant a finding that the trial court erred in denying him the benefit of an evidentiary hearing. *Blanch v. State*, 760 So. 2d 820 (Miss. Ct. App. 2000).

The petitioner was not entitled to an evidentiary hearing on his claim that he was duped by his own attorney into pleading guilty by the attorney's assurance that he would receive a maximum sentence of 10 years when, as it turned out, he received three 10-year sentences and one 15-year sentence, all to run consecutively, where the trial court inquired in some depth of the petitioner as to his understanding of his plea to ensure that he appreciated the fact that, by pleading guilty, he was exposing himself to the possibility of receiving the maximum sentence authorized by law. *Wilson v. State*, 760 So. 2d 862 (Miss. Ct. App. 2000).

The court properly denied the defendant an evidentiary hearing where he asserted that claims of constitutional proportion were supported by the facts of the case, but failed to specify what those claims were other than by vague assertions of ineffective assistance of counsel. *Feemster v. State*, 763 So. 2d 198 (Miss. Ct. App. 2000).

The court properly refused to conduct an evidentiary hearing as, even accepting the truth of his allegations in support of his claim for reconsideration of his sentence, it was evident that those facts did not form the basis for the requested relief. *Potts v. State*, 755 So. 2d 1196 (Miss. Ct. App. 1999).

A motion for post-conviction relief was appropriately denied without an evidentiary hearing where the movant failed to state his allegations with the "specificity and detail" required to establish a prima



facie showing. *Ford v. State*, 708 So. 2d 73 (Miss. 1998).

Trial court was not authorized to summarily deny motion to vacate conviction and sentence after Supreme Court granted movant's application for leave to file motion for post-conviction relief. *Hymes v. State*, 703 So. 2d 258 (Miss. 1997).

Defendant's affidavit in post-conviction proceeding, alleging claims that were totally contrary to his sworn testimony given before trial court at time he entered his guilty plea to capital murder, did not require evidentiary hearing, where record was clear as to facts presented to trial court before guilty pleas were accepted, indicating that affidavit was a "sham." *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Defendant's own affidavit was insufficient to entitle him to evidentiary hearing on his post-conviction petition. *Marshall v. State*, 680 So. 2d 794 (Miss. 1996).

Post-conviction relief petition which meets basis pleading requirement is sufficient to mandate evidentiary hearing unless it appears beyond doubt that petitioner can prove no set of facts in support of claim which would entitle him to relief. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

Post-conviction claim of ineffective assistance of counsel is properly dismissed without benefit of evidentiary hearing where it is manifestly without merit, such as when defendant fails to allege with specificity and detail that his counsel's performance was deficient and prejudicial to defense. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996).

A defendant was not entitled to an evidentiary hearing on his motion for post-conviction relief where the petition was time barred under § 99-39-5(2), and the defendant's allegations were insufficient to require the trial court to grant an evidentiary hearing where his claims were based primarily on the allegation that a witness was available to testify that the crime with which the defendant was charged had been committed by another person and that the witness was not available to make an affidavit because the defendant was incarcerated. *Campbell v. State*, 611 So. 2d 209 (Miss. 1992).

A defendant was not entitled to an evidentiary hearing where his motion for post-conviction relief was time barred under § 99-39-5 and the defendant's affidavit conflicted with the official court minutes of the proceedings leading up to the judgment under attack. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

## 7. Answer.

The trial court erred in not affording the state an opportunity to oppose a post-conviction relief motion prior to ruling on that motion where the trial court did not issue an order, prior to handing down its decision, directing the state to either file an answer to the motion or to take any other action in response to the motion. *State v. Santiago*, 773 So. 2d 921 (Miss. 2000).

## 8. Sentencing.

Where appellant pleaded guilty to possession of cocaine, he was sentenced to serve ten years concurrently with a sentence for a crime he committed in Tennessee. Appellant was not entitled to post-conviction relief, because the trial court did not impose an illegal sentence. *Brown v. State*, 920 So. 2d 1037 (Miss. Ct. App. 2005).

Appellant entered a guilty plea to armed robbery, the court accepted the State's recommendation and sentenced him to twenty-five years with three years to serve, twenty-two years suspended. While appellant was not entitled to a suspended sentence as a convicted felon, he benefitted from his illegally lenient sentence and could not obtain postconviction relief. *Weathersby v. State*, 919 So. 2d 262 (Miss. Ct. App. 2005).

Pursuant to Miss. Code Ann. § 99-39-11(1), the court did not err in denying defendant's motion for postconviction relief because his allegations that his sentence was the result of a breached plea bargain agreement entered between defense counsel and the district attorney materially contradicted the sworn assertions and acknowledgments found in his petition to enter a guilty plea. *Sanchez v. State*, 913 So. 2d 1024 (Miss. Ct. App.



2005), cert. dismissed, 920 So. 2d 1008 (Miss. 2005).

Where appellant pled guilty to the armed robbery of a fast food restaurant, and received an effective sentence of seven years, the circuit court properly dismissed his motion for post-conviction relief without a hearing. Appellant's sentence was within statutory guidelines. *Edmond v. State*, 906 So. 2d 798 (Miss. Ct. App. 2004).

### 9. Jurisdiction.

Inmate's complaint filed with the circuit court for a review of the parole board's determinations was properly dismissed because the circuit court did not have the jurisdiction to grant or deny parole. Further, while the inmate had entitled his petitiona habeas corpus action, because the parole board had complete discretion to grant or deny parole, the inmate failed to state a claim that would have required an evidentiary hearing. *Johnson v. Miller*, 919 So. 2d 273 (Miss. Ct. App. 2005).

### 10. Disqualification and recusal.

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, these inherent contradictory functions required his recusal. Failure to do so was reversible error. *Ryals v. State*, 914 So. 2d 285 (Miss. Ct. App. 2005).

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, the judge should have been recused. It was an abuse of discretion for the judge to rule on appellant's motion for post-conviction relief. *Ryals v. State*, 914 So. 2d 285 (Miss. Ct. App. 2005).

### 11. Timeliness of motion.

Where appellant's motion for post-conviction relief was filed outside the three-year statute of limitations imposed by Miss. Code Ann. § 99-39-5, the motion was time-barred; the trial court did not err by summarily dismissing the motion pursuant to Miss. Code Ann. 99-39-11(2). *Barnes v. State*, 949 So. 2d 879 (Miss. Ct. App. 2007).

Order dismissing defendant's second motion for postconviction relief pursuant to Miss. Code Ann. § 99-39-11(2) was upheld where it was filed after the expiration of the limitations period in § 99-39-5(2). No statutory exception was applicable; there was no intervening decision of either the Mississippi Supreme Court or the United States Supreme Court that would have a bearing on the outcome of the case, there was no newly discovered evidence, nor did he claim that his sentence had expired or that his probation, parole, or conditional release had been unlawfully revoked. *Gaston v. State*, 922 So. 2d 841 (Miss. Ct. App. 2006).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-13. Answer; affirmative defenses.

The answer shall respond to all of the allegations of the motion and shall assert such affirmative defenses as the state may deem appropriate.

**SOURCES:** Laws, 1984, ch. 378, § 7, eff from and after passage (approved April 17, 1984).

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.  
**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-15. Requests for discovery.

(1) A party may invoke the processes of discovery available under the Mississippi Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

(2) Requests for discovery shall be accomplished by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

**SOURCES:** Laws, 1984, ch. 378, § 8, eff from and after passage (approved April 17, 1984).

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Guilty Pleas.

## 1. In general.

Where an inmate pled guilty to murder, but argued that it was a "crime of passion," it was not error to deny the inmate's motion for the production of the transcript of the partial trial because the inmate improperly equated a "crime of passion" with a killing in the heat of passion, and there was nothing to suggest that the victim did anything in the moments prior to death to provoke or arouse sufficient passion to cause the inmate to kill the victim in a moment of rage. *Lawrence v. State*, — So. 2d —, 2007 Miss. App. LEXIS 366 (Miss. Ct. App. May 29, 2007).

Trial judge did not abuse her discretion by refusing to grant defendant's motion to conduct discovery as there was no good cause to grant the discovery requests. *Hubanks v. State*, 952 So. 2d 254 (Miss. Ct. App. 2006).

Inmate's post-conviction relief petition was properly denied because the inmate

did not show good cause for discovery under the Mississippi Post-Conviction Collateral Relief Act; the record showed that the right to discovery had been waived in a plea hearing. *Hollingsworth v. State*, 852 So. 2d 612 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Decision by trial judge to refuse to admit the facts contained with defendant's requests was proper because defendant failed to obtain leave of court to file the discovery. *Sanders v. State*, 846 So. 2d 230 (Miss. Ct. App. 2002).

Defendant failed to meet his burden and substantiate facts essential to proving need and prejudice when requesting a free copy of his guilty plea hearing transcript. *Walton v. State*, 752 So. 2d 452 (Miss. Ct. App. 1999).

This section has no application to a request by a prisoner for a change in his location. *Rochell v. State*, 748 So. 2d 103 (Miss. 1999).

Petitioner convicted of 2 counts of armed robbery was not entitled to addi-

tional discovery in his postconviction proceedings in light of failure of his case to withstand motion for summary judgment and lack of showing that information he sought was relevant to issues he raised in his postconviction relief petition. *Roland v. State*, 666 So. 2d 747 (Miss. 1995).

A prisoner who has filed a proper motion pursuant to the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99-39-15, upon good cause shown and in the discretion of the trial judge. If the prisoner's request for transcripts or other documents is denied, and his or her overall petition is ultimately denied, then the prisoner may appeal the denial of the petition for collateral relief pursuant to § 99-39-25 and, within that appeal, the prisoner may include the claim that the denial of his or her request for transcripts or other documents was error. However, nothing in the Uniform Post-Conviction Collateral Relief Act or elsewhere gives the prisoner the

right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court's ruling, to directly appeal that ruling to the Supreme Court as a separate and independent action. *Fleming v. State*, 553 So. 2d 505 (Miss. 1989), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

## 2. Guilty Pleas.

Defendant's plea petition was not an oral statement in open court, but a sworn document and similarly to statements in open court, it could be used to discredit defendant's post-plea allegations that defendant's guilty plea was involuntary; thus, in defendant's post-conviction action, the trial judge properly determined that summary dismissal was appropriate and no transcript would be ordered, where the plea petition fully enumerated the rights defendant was waiving, and informed defendant of the maximum possible sentence. *Ward v. State*, 879 So. 2d 452 (Miss. Ct. App. 2003), cert. denied, 882 So. 2d 234 (Miss. 2004).

## RESEARCH REFERENCES

**ALR.** Abuse of process action based on misuse of discovery and deposition procedures after commencement of civil action without seizure of person or property. 33 A.L.R.4th 650.

Homicide: cremation of victim's body as violation of accused's rights. 70 A.L.R.4th 1091.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Lawyers' Edition.** Prosecution's failure to preserve potentially exculpatory evidence as violating criminal defendant's due process rights under Federal Constitution—Supreme Court cases. 102 L. Ed. 2d 1041.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-17. Expansion of record.

(1) If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) The expanded record may include, without limitation, letters predating the filing of the motion in the court, documents, exhibits and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.



(3) In any case in which an expanded record is directed, copies of the letters, documents, exhibits and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(4) The court may require the authentication of any material under subsection (1) or (2) of this section.

**SOURCES:** Laws, 1984, ch. 378, § 9, eff from and after passage (approved April 17, 1984).

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

Trial court concluded that an expert in psychology would not assist in determining whether counsel was effective; thus, the trial court believed defendant's request to proceed ex parte on application for funds for an expert psychologist was

both beyond the scope of review and unnecessary, and defendant provided no authority to support his petition that an expert in psychology was required to prove a claim for ineffective assistance of counsel. *Burns v. State*, 879 So. 2d 1000 (Miss. 2004).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-19. Evidentiary hearing; summary judgment.

(1) If the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require.

(2) The court may grant a motion by either party for summary judgment when it appears from the record that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

**SOURCES:** Laws, 1984, ch. 378, § 10, eff from and after passage (approved April 17, 1984).

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Timeliness.
3. Guilty plea.
4. Defective indictment.
5. Habeas corpus.

**1. In general.**

Order summarily dismissing petitioner's motion for post-conviction relief was upheld where his allegations alone were insufficient to have required the trial judge to grant an evidentiary hearing. *Stewart v. State*, 938 So. 2d 344 (Miss. Ct. App. 2006).

A review of the record showed that no evidentiary hearing was required for defendant's post-conviction petition for relief; therefore, the lower court properly denied defendant post-conviction relief. *Barnes v. State*, 937 So. 2d 1006 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because there was no confusion as to his understanding of his plea and sentence; he signed the petition to enter a plea of guilty and acknowledged his signature to it at the plea hearing, and thus the trial court was not required to conduct an evidentiary hearing under Miss. Code Ann. § 99-39-19. *Harris v. State*, 944 So. 2d 900 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief without an evidentiary hearing was proper pursuant to Miss. Code Ann. § 99-39-19 because his claim that his counsel was ineffective was without merit. The inmate did not suggest that mitigating evidence was available and did not identify a witness or situation that might have convinced the judge to impose a lighter sentence. *McNabb v. State*, 915 So. 2d 478 (Miss. Ct. App. 2005).

Defendant was not entitled to an evidentiary hearing where no disputed fact existed and he was not misinformed about parole eligibility; the trial judge informed defendant of the three sentencing possibilities and indicated the penalty for pleading guilty to murder. *Smith v. State*, 910 So. 2d 635 (Miss. Ct. App. 2005).

Leave to proceed in the trial court did not automatically grant the petitioner a

hearing on his petition for postconviction relief; once under the jurisdiction of the trial court, that court had the authority to render an opinion with or without an evidentiary hearing, and the trial court did not err in denying defendant's petition upon finding that his claims lacked merit. *Townsend v. State*, 892 So. 2d 282 (Miss. Ct. App. 2004).

Once the defendant came under the jurisdiction of the trial court, that court had the authority to render an opinion with or without an evidentiary hearing; because defendant failed to offer any evidence in support of his claims other than the requests for admission that were properly stricken, the court did not abuse its discretion in finding that defendant had presented no material fact upon which relief could be granted. *Sanders v. State*, 846 So. 2d 230 (Miss. Ct. App. 2002).

Trial court did not err in denying defendant's motion for post-conviction relief challenging defendant's guilty plea to possession of cocaine on ten separate grounds where none of the claims made by defendant had any support in the record. *Swift v. State*, 815 So. 2d 1230 (Miss. Ct. App. 2001).

The statute authorizes the use of the summary judgment procedure found in M.R.C.P. 56. *Reeder v. State*, 783 So. 2d 711 (Miss. 2001).

The petitioner was not entitled to an evidentiary hearing on his claims that his trial counsel was ineffective both because he was coerced into entering a guilty plea and because counsel failed to make pre-trial preparations and failed to make pre-trial motions. *McMillian v. State*, 774 So. 2d 454 (Miss. Ct. App. 2000).

An evidentiary hearing on the defendant's petition for post-conviction relief was properly denied where his claims regarding the ineffectiveness of his attorney were either unsupported or contradicted on the record. *McCuiston v. State*, 758 So. 2d 1082 (Miss. Ct. App. 2000).

Defendant's affidavit in post-conviction proceeding, alleging claims that were totally contrary to his sworn testimony given before trial court at time he entered his guilty plea to capital murder, did not



require evidentiary hearing, where record was clear as to facts presented to trial court before guilty pleas were accepted, indicating that affidavit was a "sham." *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Defendant's own affidavit was insufficient to entitle him to evidentiary hearing on his post-conviction petition. *Marshall v. State*, 680 So. 2d 794 (Miss. 1996).

Defendants' claim of ineffective assistance of counsel based on allegation that if they had known that their attorneys would not call any witnesses, they would have themselves testified, amounted to sham, and therefore defendants were not entitled to evidentiary hearing to set aside validly imposed sentences based upon this claim, considering that, prior to testimony commencing, trial judge made detailed and lengthy presentation to defendants on subject of their right to testify and defendants affirmatively responded to judge's questions as to whether they understood that they had right to testify regardless of what any other person wished or ordered them to do. *King v. State*, 679 So. 2d 208 (Miss. 1996).

To be entitled to evidentiary hearing on claim of ineffective assistance of counsel, petitioner must allege with specificity and detail that counsel's performance was deficient and that deficient performance so prejudiced his defense so as to deprive him of a fair trial. *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

Evidentiary hearing was required in post-conviction proceeding to determine whether defendant's attorney failed to inform him of his right to appeal conviction where attorney's response to defendant's petition for out-of-time appeal stated generally that he advised defendant of options and that he specifically advised defendant that district attorney would drop other pending charges if defendant would forego his appeal, and defendant stated only that he was not going to appeal his conviction, but nothing showed that defendant had been informed of his right to appeal. *Summerville v. State*, 667 So. 2d 14 (Miss. 1996).

To be entitled to evidentiary hearing on merits of ineffectiveness of counsel claim, defendant must establish *prima facie*

claim on both prongs of Strickland test by alleging with specificity and detail that his counsel's performance was deficient and that the deficient performance prejudiced defense so as to deprive him of fundamentally fair trial. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Evidentiary hearing is not necessary where allegations in petition for post-conviction relief are specific and conclusory. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The failure of a trial court to grant an evidentiary hearing was error where the court was faced with contradictory affidavits disputing the essential facts of the defendant's claim that he was denied his right to an appeal through no fault of his own, and the affidavit of the defendant's attorney fell short of demonstrating an effective waiver of the right to appeal. *Harris v. State*, 578 So. 2d 617 (Miss. 1991).

The failure of a trial court to grant an evidentiary hearing was error where the court was faced with contradictory affidavits disputing essential facts of the defendant's claim that he was denied his right to an appeal through no fault of his own. However, an evidentiary hearing is not to be ordered every time there are contradictory affidavits. In order for a contested fact to require an evidentiary hearing, it must be material. Moreover, where an affidavit is overwhelmingly belied by unimpeachable documentary evidence in the record so that the court can conclude that the affidavit is a sham, no hearing is required. *Wright v. State*, 577 So. 2d 387 (Miss. 1991).

Defendants were not entitled to an evidentiary hearing on their claims that they were denied the right to testify in their own defense at trial, where their claims were based on allegations that they received substantial advice from their attorneys that it would be contrary to their interests to testify and that they were unaware of the right of allocution, but the defendants did not suggest that they ever questioned their attorneys regarding their rights in this regard nor was there any suggestion that the attorneys gave any dubious legal advice on this point. *Jaco v. State*, 574 So. 2d 625 (Miss. 1990).

A judge would be disqualified from ruling on a defendant's motion for an eviden-



tiary hearing under the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) where the judge was also the district attorney who signed the indictment. *Moore v. State*, 573 So. 2d 688 (Miss. 1990).

## 2. Timeliness.

A defendant was not entitled to an evidentiary hearing on his motion for post-conviction relief where the petition was time barred under § 99-39-5(2), and the defendant's allegations were insufficient to require the trial court to grant an evidentiary hearing where his claims were based primarily on the allegation that a witness was available to testify that the crime with which the defendant was charged had been committed by another person and that the witness was not available to make an affidavit because the defendant was incarcerated. *Campbell v. State*, 611 So. 2d 209 (Miss. 1992).

A defendant was not entitled to an evidentiary hearing where his motion for postconviction relief was time barred under § 99-39-5 and the defendant's affidavit conflicted with the official court minutes of the proceedings leading up to the judgment under attack. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

## 3. Guilty plea.

Record contained sufficient evidence to warrant an evidentiary hearing in order to determine whether defendant satisfied his obligations with respect to the plea agreement; if the trial court determined that defendant had substantially complied with his obligations under the plea agreement to his detriment, then the trial court was duty bound to sentence him consistent with his bargain, notwithstanding the absence of supporting affidavits. *Callins v. State*, — So. 2d —, 2007 Miss. App. LEXIS 243 (Miss. Ct. App. Apr. 17, 2007).

Denial of the inmate's petition for post-conviction relief was proper under Miss. Code Ann. § 99-39-19(1) because, since no evidence accompanied the inmate's motion to contradict the trial court's findings when the guilty plea was entered, he was not entitled to an evidentiary hearing un-

der the Uniform Post-Conviction Collateral Relief Act, Miss. Code Annotated §§ 99-39-1 to 99-39-29. *Hardiman v. State*, 904 So. 2d 1225 (Miss. Ct. App. 2005).

Defendant's petition for post-conviction relief failed to include any affidavits, other than his own, or evidence to support his claims that his guilty plea was involuntary, and the plea agreement signed by defendant thoroughly explained the proceedings. Therefore, it was not error for the trial judge to deny an evidentiary hearing; moreover, he did not submit a transcript of the plea proceeding, and the existence of his claims within his brief alone could not be relied upon by the appellate court. *Dearman v. State*, 910 So. 2d 708 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief without a hearing was proper pursuant to Miss. Code Ann. § 99-39-19, where he was afforded a thorough plea hearing and where he also voluntarily entered his plea of guilty. The trial judge informed the inmate of both his rights and the maximum sentence he could have received for the crime of robbery, to which he had pled guilty. *Sanders v. State*, 900 So. 2d 1213 (Miss. Ct. App. 2005).

In petitioner's action for postconviction relief, he was not entitled to an evidentiary hearing where no evidence accompanied his motion to contradict the trial court's findings including his guilty plea, the record showed he understood that he was giving up his right to a jury trial, his right to testify and his right to appeal, and that the elements of the offense were fully explained to him. *Jennings v. State*, 896 So. 2d 374 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

The defendant was properly denied an evidentiary hearing where he asserted that he pleaded guilty because he understood that if he failed to complete an Intensive Supervision/House Arrest Program successfully, he would only receive one year in jail, but the record established that he acknowledged to the trial judge that the maximum sentence on count one was 30 years in jail, a one million dollar fine, plus court costs and lab fees and that the maximum sentence on count two was

20 years in jail, a five hundred thousand dollar fine, plus court costs. *Simmons v. State*, 784 So. 2d 985 (Miss. Ct. App. 2001).

The defendant was not entitled to an evidentiary hearing on his claim that his guilty plea had been involuntary where he argued that his plea was the result of intimidation and threats of the possibility of receiving a life sentence made by his previous attorney, but nothing in the transcript from the plea hearing indicated that the plea was involuntary and he did not voice any dissatisfaction with his attorney when questioned. *Stovall v. State*, 770 So. 2d 1019 (Miss. Ct. App. 2000).

The petitioner was not entitled to an evidentiary hearing on his claim that he was duped by his own attorney into pleading guilty by the attorney's assurance that he would receive a maximum sentence of 10 years when, as it turned out, he received three 10-year sentences and one 15-year sentence, all to run consecutively, where the trial court inquired in some depth of the petitioner as to his understanding of his plea to ensure that he appreciated the fact that, by pleading guilty, he was exposing himself to the possibility of receiving the maximum sentence authorized by law. *Wilson v. State*, 760 So. 2d 862 (Miss. Ct. App. 2000).

The defendant was not entitled to a hearing on his claim that he had such a diminished intellectual capacity as to preclude an informed decision to enter a plea of guilty because the mere allegation that a person was enrolled in special education classes during that person's high school career does not make a prima facie case of mental or intellectual incompetency to enter an informed guilty plea to a criminal charge. *Magee v. State*, 752 So. 2d 1100 (Miss. Ct. App. 1999).

The petitioner was entitled to an evidentiary hearing to determine (1) whether his motion was excepted from the three-year statute of limitations period on the basis of a letter which was dated after the three year statute of limitations had run, and which stated that his federal sentence would run consecutively to his state sentence, notwithstanding that the trial judge intended his state sentence to run concurrently with his federal sentence,

and (2) the status of his federal and state sentences. *Bell v. State*, 759 So. 2d 1111 (Miss. 1999).

The petitioner was entitled to an evidentiary hearing on his claim that his attorneys provided him with erroneous information on parole eligibility, thereby causing him to involuntarily enter a guilty plea. *White v. State*, 751 So. 2d 481 (Miss. Ct. App. 1999).

Defendant was not prejudiced in postconviction proceeding when trial court refused to grant his request for transcript of hearing in which he pleaded guilty to capital murder, where record was amended to include transcript of plea proceeding, and affidavit in which defendant challenged voluntariness of his plea was inconsistent with transcript. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

Postconviction petitioner convicted of 2 counts of armed robbery pursuant to his guilty plea was not entitled to evidentiary hearing on voluntariness of his plea, though petitioner disavowed voluntariness of his plea, where issues raised in defendant's petition were covered by guilty plea proceedings. *Roland v. State*, 666 So. 2d 747 (Miss. 1995).

Evidentiary hearing is necessary on postconviction challenge to plea if plea hearing does not reflect that petitioner was advised concerning rights of which he allegedly claims ignorance. *Roland v. State*, 666 So. 2d 747 (Miss. 1995).

A defendant was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading guilty. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of



counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

A defendant who pleaded guilty without an affirmative expression by the trial court informing him that by pleading guilty he waived his constitutional right against self-incrimination, was entitled to an evidentiary hearing on the issue of whether his guilty plea was involuntarily and unintelligently made. Although the defendant's petition to the court to accept his plea of guilty recited that there was "no constitutional right or reason why this court should not accept this plea and enter sentence thereon," this was not sufficient to show that he was advised or informed of his constitutional right against self-incrimination. *Horton v. State*, 584 So. 2d 764 (Miss. 1991).

A defendant's allegations in his motion for postconviction collateral relief—that he was denied effective assistance of counsel and that, as a result, his guilty plea was not entered voluntarily—warranted an evidentiary hearing for a determination on those issues where the plea hearing had not been transcribed, so that it was not possible to make a determination of whether the defendant entered his plea voluntarily or whether his attorney provided effective assistance. *Wilson v. State*, 577 So. 2d 394 (Miss. 1991).

#### 4. Defective indictment.

Evidentiary hearing was not mandated for the inmate pursuant to Miss. Code Ann. § 99-39-19(1) after he argued that his evidence proved that no grand jury was in session on the date of his indictment because the hearing would have been merely due to the existence of contradictory affidavits. *Gray v. State*, 841 So. 2d 204 (Miss. Ct. App. 2003).

Allegations that indictments were defective because the record did not identify them as the indictments returned by the appropriate grand jury and because they were not accompanied by the affidavit of the grand jury foreman, involved nonjurisdictional defects which were waived when the defendant entered a voluntary guilty plea and failed to timely assert his claims in the lower court. Moreover, it was not clear that the defendant would have been entitled to relief even if the claims had been timely asserted because the indictments were signed by the foreman of the grand jury and marked "filed" by the county circuit clerk. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

#### 5. Habeas corpus.

Where appellant's claims that she was forced to confess her arson crimes was contradicted by the record of her plea hearing, the trial court properly disregarded the claims in her motion for postconviction relief. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

No evidentiary hearing was necessary under Miss. Code Ann. § 99-39-19(1) on a prisoner's claim that he was entitled to earned time credit because there was no disputable fact, but merely a question of statutory interpretation. *Rowland v. Britt*, 867 So. 2d 260 (Miss. Ct. App. 2003).

Habeas corpus petitioner making collateral attack on guilty plea is entitled to evidentiary hearing. *Williams v. State*, 473 So. 2d 974 (Miss. 1985).

### RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.



**§ 99-39-21. Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.**

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

**SOURCES:** Laws, 1984, ch. 378, § 11, eff from and after passage (approved April 17, 1984).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to "this chapter" was changed to "this article." The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### JUDICIAL DECISIONS

1. In general.
2. Waiver of objection.
3. Procedural bar.
4. Exclusion of blacks from jury.
5. Collateral estoppel.
6. Res judicata.
7. Burden of proof.

#### 1. In general.

Although defendant argued on appeal that he received a disparate sentence because he was a black man and the alleged victim was a white woman, defendant did not make this argument in his motions for post-conviction relief; therefore, the issue

was procedurally barred from further review. *Bates v. State*, 914 So. 2d 297 (Miss. Ct. App. 2005).

Although third postconviction relief petition to vacate sentence and resentence would generally have been successive writ barred, time-barred and procedurally barred, imposition of sentence of life imprisonment without benefit of parole for murder, imposed when statute did not permit or provide for said sentence, was unenforceable sentence and plain error, capable of being addressed. *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996).

Procedural bars of waiver, different theories, and *res judicata* and exception thereto as defined in postconviction relief statute are applicable in death penalty postconviction relief applications. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Heightened appellate scrutiny in death penalty cases does not require abandonment of Supreme Court's contemporaneous objection rule, which applies with equal force to death cases. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A petitioner's petition for a writ of habeas corpus would be treated as a motion under § 99-39-5(1)(g), which authorizes a postconviction motion in the nature of collateral review by the petitioner, since she was in custody under a Mississippi conviction and claimed that she was "unlawfully held in custody." Although the petitioner was convicted in 1981, and the conviction was affirmed on direct appeal in 1983, the substantive portions of the Post-Conviction Relief Act, which became effective April 17, 1984, were applicable to the petition. Furthermore, the waiver and procedural bar provisions of the Act were applicable even though the petitioner was tried and convicted prior to the effective date of the Act. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

Based on detailed review of entire record, defendant was ably represented by counsel at his trial, where numerous allegations of ineffective assistance of counsel were procedurally barred by this section, despite contention that such statutory bars should not be applied retroactively to defendant, where statute merely codified existing law and could therefore be applied to prisoners tried before its effective

date. *Stringer v. Scroggy*, 675 F. Supp. 356 (S.D. Miss. 1987), *aff'd*, 862 F.2d 1108 (5th Cir. 1988), *reh'g denied*, 866 F.2d 1417 (5th Cir. 1989), *vacated*, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), *on remand*, 909 F.2d 111 (5th Cir. 1990), *vacated on other grounds*, 979 F.2d 38 (5th Cir. 1992).

Issue of discriminatory application of death penalty to defendant is procedurally barred, absent showing of cause, because issue had never been raised prior to appeal to Supreme Court. *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987).

Stay of execution not granted where alleged basis was that imposition of death sentence upon person too young to sit on jury violated Eighth Amendment proscription against cruel and unusual punishment, because it had never been raised before in this case and was therefore barred, and point had been summarily denied in prior cases. *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987).

Review was not mandated under this section of prosecutorial misconduct where the matter had not been raised on direct appeal, and the cumulative effect of alleged misconduct did not have the effect of denying the defendant a fair and impartial trial. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), *reh'g denied*, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Alleged error should be revived, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where the appellate court has suddenly reversed itself on an issue previously settled. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), *reh'g denied*, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Petitioner's allegation that since all trial jurors were white he was denied an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, which allegation was not urged on direct appeal, would not be considered on motion to vacate judgment and sentence, where there was no information or document in the record

indicating the race of the jurors; and he failed to assert any facts to show a systematic or intentional exclusion of any group by court officials to deny him a jury drawn from a cross-section of the community. *Rideout v. State*, 496 So. 2d 667 (Miss. 1986).

Since allegations that trial court committed reversible error in allowing jury separation, and that petitioner had been compelled to be a witness against himself, were not alleged as error and raised on direct appeal, they could not be raised for first time on motion for postconviction relief, and were procedurally barred. *Smith v. State*, 490 So. 2d 860 (Miss. 1986).

The application of the procedural bar of subsection (1) of this section would be inappropriate to a defendant who had had no earlier meaningful opportunity to present issue of denial of effective assistance of counsel. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

Petitioner who, although he had had opportunity to do so, had not earlier raised the issue of ineffectiveness of counsel did not meet the requirement of "cause" in subsection (4) of this section. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7 year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under § 99-19-81. *Smith v. State*, 477 So. 2d 191 (Miss. 1985).

## 2. Waiver of objection.

Specifically, defendant contended that the plea agreement failed to articulate the State's burden of proof and since that burden was not announced in open court, his guilty plea was involuntary. However, since defendant did not raise that issue at the sentencing hearing, he waived its consideration on a motion for post-conviction relief pursuant to Miss. Code Ann. § 99-

39-21(1); in any event, the transcript of the plea hearing revealed that the trial court properly informed defendant of the specific charges, the State's burden of proof, and made a detailed inquiry as to whether defendant understood the plea agreement that he had signed, and defendant stated under oath that he understood the plea agreement and the consequences of pleading guilty. *Moore v. State*, 906 So. 2d 793 (Miss. Ct. App. 2004).

Defendant's contention that he was improperly restricted in his ability to attack the state's crime laboratory testing of the chemical makeup of the substances obtained from him was found by the court to be procedurally barred, where defense counsel offered no contention that the materials produced by the state to explain the process had not resolved the matter. *Wright v. State*, 863 So. 2d 1005 (Miss. Ct. App. 2004).

Denial of defendant's post-conviction motion was proper where defendant waived any objection to the failure to reference in the indictment the correct code section he was being charged with when he pled guilty. Moreover, because defendant did not raise issues related to the conduct of the criminal proceeding brought against him and the lack of effectiveness of his attorney before the trial court in his motion for post-conviction relief, because none of the issues raised were jurisdictional, and because he failed to make any legal arguments or citation to authority, defendant could not raise issues for the first time on appeal of denial of his post-conviction motion. *Walker v. State*, 861 So. 2d 354 (Miss. Ct. App. 2003).

30-day statute of limitations for appealing defendant's due process claims had expired since the claims related to a final judgment reviewable on appeal post sentencing, Miss. Code Ann. § 99-39-21; any constitutional claims were waivable if not properly appealed within the limitation period, and the appellate court could overlook such a waiver where defendant did not meet the burden of showing cause and actual prejudice. *Carr v. State*, 881 So. 2d 261 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

In a case in which appellant sought post-conviction collateral relief because he



claimed, among other things, that the indictment was defective, appellant failed to raise this issue before entering his guilty pleas to drug charges, thereby waiving possible complaints of a defective indictment. *Hentz v. State*, 852 So. 2d 70 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Where the inmate claimed in a post-conviction appeal that the inmate's arrest was illegal for lack of a warrant or probable cause, the inmate waived the argument under Miss. Code Ann. § 99-39-21(1) by failing to raise the issue before entering a guilty plea, and did not offer any reason why the waiver should have been suspended. *Battaya v. State*, 861 So. 2d 364 (Miss. Ct. App. 2003).

Defendant waived his objection to the sufficiency of indictments charging defendant with two counts of transferring cocaine, enhanced penalty, and being a habitual offender, by not raising his claims before the trial court and by voluntarily pleading guilty to the charges. *Terry v. State*, 839 So. 2d 543 (Miss. Ct. App. 2002).

Post-Conviction Collateral Relief Act provides procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Procedural bars of waiver, different theories, and *res judicata* and exception thereto as defined in postconviction relief statute are applicable in death penalty postconviction relief application. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

If no contemporaneous objection is made, the error, if any is waived, and that rule's applicability is not diminished in a capital case. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Doctrine of waiver barred capital murder defendant's postconviction claim that his prosecution by relative of victim deprived him of due process of law, where defense counsel was well aware of the kinship at time of trial but voiced no

objection nor raised point on appeal, and defendant could not show cause or actual prejudice. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Doctrine of waiver or forfeiture barred capital murder defendant's postconviction claim that prosecutor directly commented on his failure to testify during guilt-finding phase of his trial, where no objection was raised during trial and no claim was raised on direct appeal. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Doctrine of waiver/forfeiture barred capital murder defendant's postconviction claim that he was denied his right to testify during guilt-finding and sentence-determination phases of his bifurcated trial, where issue was never raised at trial or on direct appeal, and in any event, claim failed on its merits, in that transcript indicated that defendant had elected not to testify in his own behalf. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Claim that "especially heinous, atrocious, or cruel" aggravating factor was submitted to jury in capital murder prosecution without limiting instruction in violation of Eighth Amendment will not be barred from consideration on postconviction review, even if defendant did not object at trial or on direct appeal. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A capital murder defendant's objection to the admission of a blood sample obtained without a warrant was barred by the waiver of subsection (1) of this section where the defendant did not raise the issue on direct appeal, since the basis of the Fourth Amendment objection to the admission of illegally obtained evidence is well known, and the defendant had practically no chance of escaping conviction even without the blood sample evidence. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

Allegations that indictments were defective because the record did not identify them as the indictments returned by the appropriate grand jury and because they were not accompanied by the affidavit of the grand jury foreman, involved nonjurisdictional defects which were waived when the defendant entered a voluntary guilty plea and failed to timely assert his claims in the lower court. Moreover, it was

not clear that the defendant would have been entitled to relief even if the claims had been timely asserted because the indictments were signed by the foreman of the grand jury and marked "filed" by the county circuit clerk. *Brooks v. State*, 573 So. 2d 1350 (Miss. 1990).

Intervening decision alone does not preclude waiver under this section, but can only except case from effect of 3-year statute of limitations in § 99-39-5(2) and prohibition of second petitions in § 99-39-27(9). *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Issues not raised on direct appeal or at trial court are procedurally barred and not subject to further review by court; additionally, claims which were available, but not previously asserted on direct appeal, are waived. *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Certain claims were procedurally barred because they had not been raised in any previous court pleadings, nor had sufficient legal cause been shown to excuse such failure; claims were: confession taken in violation of right to counsel; the exclusion of mitigating and rebuttal evidence; allegation that comments of trial judge and district attorney diminished jury's sense of sentencing responsibility and were constitutionally impermissible; that state statute in force at time of trial was facially unconstitutional; and that juror was biased. *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987).

Claim of ineffective assistance of counsel is not procedurally viable where defendant waived issue when he declined to assert that point in his error coram nobis pleading; defendant had not shown sufficient cause to excuse this waiver where record reflected that trial counsel exited state court proceedings at conclusion of direct appeal and did not participate in presentation of error coram nobis pleading. *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987).

Issues respecting an indictment which are essentially procedural are subject to

waiver if not timely preserved and presented on direct appeal. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

Waiver and procedural bar provisions of postconviction relief statute are largely codification of existing law and apply to case in which petitioner was tried prior to effective date of statute. *Dufour v. State*, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

### 3. Procedural bar.

In a resentencing trial in a capital murder case, under the Eighth Amendment defendant was permitted to introduce mitigating evidence; however, he was not permitted to introduce evidence that he was not the victim's killer because that issue was procedurally barred from further consideration under the doctrine of res judicata. *King v. State*, — So. 2d —, 2007 Miss. LEXIS 317 (Miss. May 31, 2007).

Although defendant did not raise the issue of ineffective assistance of counsel on direct appeal, his claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1), (3) because he had the same counsel at trial and on appeal and it was unrealistic to think that counsel would have preserved the issue of ineffective assistance as to himself; other claims, however, which could have been raised on direct appeal but were not, were procedurally barred. *Lynch v. State*, 951 So. 2d 549 (Miss. 2007).

Denial of the inmate's petition for postconviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because whether he was entitled to a lesser-included offense instruction had been addressed and was barred from further consideration under Miss. Code Ann. § 99-39-21(2). *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

Defendant was procedurally barred from asserting an ineffective assistance of counsel claim because defendant had a clear opportunity to object to what he contended was a lack of investigation and presentation of mitigating evidence during the trial; defendant made no objections at trial, nor during his direct appeal, and defendant did not identify newly discovered evidence, but used evidence he readily admitted was available during



trial and direct appeal to support his claim of ineffective assistance. *Brown v. State*, 948 So. 2d 405 (Miss. 2006).

Petitioner was denied post-conviction relief from her capital murder conviction; although she argued that her death sentence was disproportionate because her son and the hired killer received lesser sentences, the issue was raised on direct appeal; therefore, petitioner was procedurally barred by res judicata from raising the issue under Miss. Code Ann. § 99-39-21(3). Also, petitioner's claims were found to be meritless. *Byrom v. State*, 927 So. 2d 709 (Miss. 2006).

Inmate's claim that when reading Miss. Code Ann. § 97-5-39(2)(c) in conjunction with Miss. Code Ann. § 97-3-19(2)(f), the result was an automatic implication of a capital crime regardless of how or in what manner the child suffered death, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not; the claim was also without merit because the Mississippi Supreme Court had previously found that upon reading the statutes in conjunction they were constitutional. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

Inmate's claim that the use of the avoiding arrest aggravating factor without a limiting instruction was unconstitutional was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

Inmate's claim that the use of the robbery aggravating factor during sentencing was inappropriate as it allowed the use of the underlying felony, which elevated the crime to capital murder, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006).

In a death penalty case, defendant waived the issue of the prosecutor's alleged conflict of interest because defendant failed to move for the disqualification of the prosecutor, and he failed to raise the issue on his direct appeal. *Scott v. State*, 938 So. 2d 1233 (Miss. 2006).

Post-conviction relief was denied because defendant's assertion that he re-

ceived ineffective assistance of counsel during the sentencing phase of a capital murder trial was procedurally barred; however, even if it was not, ineffectiveness was not shown because, despite mitigation evidence that defendant was a great person and had not been violent, the state could have presented evidence of his prior convictions. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied based on the qualifications of an expert who took dental molds in a capital case because the issue was procedurally barred since it could have been raised at trial or on direct appeal; even if it was not, defendant did not contend that improper methods were used in creating the molds, that the expert was not qualified, or that the molds were not an accurate replica. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied in a capital murder case on the issue of whether a circuit court erred by using the aggravating circumstance of "especially heinous, atrocious, or cruel" based on a sufficiency of the evidence; even if it was not barred, the issue was without merit since the victim was beaten, strangled, raped, stabbed, and left to die as her home was set on fire. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied in a capital murder case based on the argument that the use of the "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was inappropriate was denied because it was procedurally barred; even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison.



Howard v. State, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied in a capital murder case based on the assertion that an expert's testimony was not reliable or relevant due to not being grounded in the methods and procedures of science because the issue was procedurally barred since it was considered and rejected on direct appeal. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant was denied a fair trial based on alleged falsehoods and misrepresentations by an expert was procedurally barred since it was capable of being raised on direct appeal; even if it was not, it was not reasonably likely that the statements affected the judgment of the jury, even if they were false, because ample evidence was presented regarding the expert's credibility or lack thereof. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Defendant's request for post-conviction relief was denied on the basis of ineffective assistance of counsel due to an alleged failure to investigate in general because that issue was procedurally barred; however, there was no ineffectiveness based on an alleged failure to investigate during the guilt phase of a capital murder trial since counsel would not have been able to determine that testimony would have been perjury, defendant did not have an alibi defense, and decisions regarding the examination of an expert were trial strategy where there was no showing that the expert was not qualified. *Howard v. State*, 945 So. 2d 326 (Miss. 2006).

Court denied petitioner's request for post-conviction relief from her conviction for capital murder based on her claim that she was improperly informed of the trial judge's sentencing options when she was deciding to waive a jury determination of her sentence and to place the decision in the hands of the trial judge because petitioner did not raise the issue on direct appeal and was procedurally barred under Miss. Code Ann. § 99-39-21(1), and she failed to show cause and actual prejudice by being informed that the trial judge had "three sentencing options" under the capital sentencing statute, Miss. Code Ann.

§ 99-19-101(1), in that it could have sentenced her to death, life imprisonment without eligibility for parole, or life imprisonment. In reality, the trial court had only two sentencing options, death or life imprisonment without parole eligibility, because the parole statute, Miss. Code Ann. § 47-7-3(1)(f), denies parole eligibility to any person charged, tried, convicted, and sentenced to life imprisonment under the provisions of Miss. Code Ann. § 99-19-101. *Byrom v. State*, 927 So. 2d 709 (Miss. 2006).

Where the same judge presided over appellant's first and second motion for post-conviction relief, appellant's claim that the judge should have recused himself was not raised below, and therefore could not be raised in the post-conviction appeal under Miss. Code Ann. § 99-39-21(1). *Hudson v. State*, 932 So. 2d 842 (Miss. Ct. App. 2005).

Where an inmate failed to raise his claim that the trial court failed to inform him of the maximum sentence allowed by law before accepting his plea of guilt to accessory after the fact to murder in the trial court, under Miss. Code Ann. § 99-39-21, the claim was procedurally barred from being brought for the first time on appeal. *Fuller v. State*, 914 So. 2d 1230 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper pursuant to Miss. Code Ann. § 99-39-21(1) where his argument that the judge should not have presided over the revocation hearing was not preserved for review because he did not raise the issue at the revocation proceeding. In addition, it was without merit because the judge was exercising his authority under Miss. Code Ann. § 47-7-37 to issue a warrant for the inmate's arrest for a probation violation; thus, he was acting within his statutory authority and there was no indication that he was unqualified or biased. *Hubbard v. State*, 919 So. 2d 1022 (Miss. Ct. App. 2005).

Denial of the inmate's post-conviction motion to vacate an illegal sentence was proper pursuant to Miss. Code Ann. 99-39-23(6) where he did not raise the issue of an illegal sentence in his first petition for post-conviction relief but could have. Thus, the issue was barred by Miss. Code

Ann. § 99-39-21(1). *Bradley v. State*, 919 So. 2d 1062 (Miss. Ct. App. 2005).

Defendant's "letter of hope" to the trial judge did not constitute a first motion for post-conviction relief, in part, because it was never answered or denied. Nevertheless, the trial court's other grounds for denying defendant's motion were valid, since defendant's request for a reduction in his sentence could have been brought before the trial court at trial or on direct appeal, and therefore he waived the issue; secondly, the trial judge reviewed the record, found that defendant had openly admitted his guilt at the plea proceeding, and found that his motion was meritless as defendant had made the strategic gamble of refusing the more lenient plea agreement that had been offered. *Spencer v. State*, 907 So. 2d 353 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2004).

Issue of whether a police officer was properly qualified to express an opinion regarding the blood spatter evidence found at a murder scene was twice litigated before and affirmed by the Supreme Court of Mississippi; therefore, the issue had already been litigated and was procedurally barred when the defendant again brought the issue before the court for a third time in a petition for post-conviction relief; that defendant was attempting to rephrase the issue as a knowing presentation of false or misleading evidence by the State of Mississippi did not change the underlying claim, which was the same one that had already been addressed and found to have no merit. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

Defendant's claim that it was a violation of the law of the case doctrine and the doctrines of collateral and equitable estoppel to allow the State of Mississippi to present evidence that the victim was killed execution-style was procedurally barred by Miss. Code Ann. § 99-39-21 because no objection was raised by defendant at trial or on previous appeal on defendant's claim; furthermore, defendant could have and yet failed to raise this issue in previous post-conviction pleadings, *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

Defendant's claim in a post-conviction proceeding of ineffective assistance of

counsel regarding a mental evaluation of defendant was procedurally barred because the Supreme Court of Mississippi had already addressed similar issues related to the mental evaluation in its most recent opinion concerning defendant. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005).

Inmate did not raise any proportionality of his sentence argument on direct appeal; rather, the Supreme Court considered the issue on its own because of the requirement of Miss. Code Ann. § 99-19-105(3). Thus, the inmate's argument in his petition for post-conviction relief was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it was not raised on direct appeal. *Knox v. State*, 901 So. 2d 1257 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 797, 163 L. Ed. 2d 630 (2005).

Death-sentenced Mississippi inmate was not entitled to federal habeas relief under 28 U.S.C.S. § 2254 following his murder for hire conviction; his U.S. Const. amend. VI ineffective assistance claim was procedurally barred by Miss. Code Ann. § 99-39-21 because he employed different counsel on direct appeal and failed to raise the claim. Alternatively, the inmate's claim failed on the merits because there were no deficiencies in counsel's trial strategy; further, juxtaposing the inmate's scant potential mitigating evidence alongside the calculated, vicious nature of his crime indicated the inmate did not demonstrate a reasonable probability that the outcome of the sentencing phase would have been different but for counsel's purported deficient performance. *Nixon v. Epps*, 405 F.3d 318 (5th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 650, 163 L. Ed. 2d 528 (2005).

Defendant argued that his guilty plea was involuntary due to the trial court's failure to advise him of the elements of the crimes to which he pled guilty. This issue was procedurally barred because defendant did not raise it at the time he was sentenced; therefore, he waived its consideration on a motion for postconviction relief. *Gaddis v. State*, 904 So. 2d 1197 (Miss. Ct. App. 2004).

Where issues were addressed during trial and procedurally barred from being raised in an application for postconviction



relief under Miss. Code Ann. § 99-39-21(3), an inmate could not recast the issues under the guise of ineffective assistance of counsel. *Hughes v. State*, 892 So. 2d 203 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Where the issue of venue was raised at trial and affirmed on direct appeal, it was procedurally barred from further consideration on collateral review under Miss. Code Ann. § 99-39-21(3) *Hughes v. State*, 892 So. 2d 203 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Petitioner's claims concerning the testimony of his cell mates who testified that he admitted having murdered the victim, and the issue of the admissibility of DNA evidence, were raised and rejected on direct appeal; those issues having been previously raised and rejected were procedurally barred by the doctrine of *res judicata* in his action for postconviction relief in the trial court. *Gray v. State*, 887 So. 2d 158 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Appellant's claim that her emotional state at the time she committed arson warranted a plea of not guilty by reason of temporary insanity because the crime was a crime of passion was procedurally barred under Miss. Code Ann. § 99-39-21(1) because appellant failed to raise the defense when she pled guilty. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

All of the claims raised in petitioner's second petition for postconviction relief other than his ineffective assistance of counsel claims, including a claim that there was no waiver of formal indictments and a claim challenging the validity of his guilty plea, were barred by Miss. Code Ann. § 99-39-21(1) (Supp.) because the claims should have been raised before petitioner pled guilty and petitioner showed no evidence of cause and actual prejudice. *Pinson v. State*, 881 So. 2d 348 (Miss. Ct. App. 2004).

State Supreme Court rejected defendant's claim that he was deprived of his right to a fair trial because some jurors saw him shackled, as the issue was not raised by defendant on his direct appeal.

*Doss v. State*, 882 So. 2d 176 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2513, 161 L. Ed. 2d 1113 (2005).

Prisoner's claim that a 911 tape was erroneously admitted into evidence at his murder trial was procedurally barred under Miss. Code Ann. § 99-39-21(1) because this issue was capital for determination at trial or on direct appeal. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Where the issue of whether imposition of the death penalty on defendant for his crime was excessive or disproportionate was decided against defendant on direct appeal; the claim was procedurally barred and could not be relitigated in defendant's postconviction petition for relief under Miss. Code Ann. § 99-39-21(3); further, it had previously been determined that the death penalty for one who committed felony murder did not violate defendant's rights under U.S. Const. amend. VIII. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Denial of the inmate's petition for postconviction relief under Miss. Code Ann. § 13-5-1 was proper where the issue was procedurally barred from being raised for the first time in that petition; further, inmate's contention was without merit because the record indicated that the inmate had affirmed the juror's presence after fully exploring her abilities to read, write, and comprehend English. *Puckett v. State*, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

In a capital murder case, when defendant asserted, on post-conviction relief, that his counsel had provided ineffective assistance of counsel, his claims were procedurally barred because they were either unsuccessfully argued on direct appeal of his conviction or could have been raised on direct appeal and were not. *Manning v. State*, 903 So. 2d 29 (Miss. 2004).

Direct claim that an inmate was improperly shackled at trial could have been raised at the trial and again on direct appeal; thus, that claim was procedurally barred under Miss. Code Ann. § 99-39-21(2). *Smith v. State*, 877 So. 2d 369 (Miss. 2004).



There was no merit in the allegation that the jury failed to consider an inmate's conviction and sentence for capital murder separately from co-defendant's; the court first noted that the issue was raised on direct appeal and was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2), and in any event, the jury returned individualized verdicts and the evidence showed that the jury considered the inmate separately. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for allowing the inmate to be tried jointly with co-defendant at both the guilt and penalty phases because (1) this issue was substantially addressed on direct appeal, and thus was barred in post-conviction proceedings under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the issue was without merit because the inmate and co-defendant insisted on being tried together. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to object to certain prosecutorial statements made during closing argument at the guilt phase because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the comments made were within the wide latitude granted in an attorney's closing argument. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Trial judge did not erroneously instruct the jury in the inmate's capital murder trial that death could be imposed if aggravating and mitigating circumstances were of equal weight because (1) the issue was addressed on direct appeal and found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) it also failed under case law. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's claim concerning error on a verdict form in connection with the inmate's capital murder trial was found to be without merit on direct appeal, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the inmate raised nothing new before the court. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not requesting an amendment to sentencing instructions because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, there was no showing of deficient performance. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's cumulative effect argument in connection with the inmate's capital murder trial was procedurally barred under Miss. Code Ann. § 99-39-21(3) as res judicata, and in any event, the issue was without merit because the cumulative errors, in any, did not require relief. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate could not raise in his petition for postconviction relief that his trial counsel was ineffective for failing to object to certain jury instructions as the Supreme Court of Mississippi had already decided on the inmate's direct appeal that the instructions did not incorrectly state the law; thus, the argument was procedurally barred. *Bell v. State*, 879 So. 2d 423 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

In his petition for post-conviction relief, the inmate argued that a witness's testimony was false and that the State knowingly presented false evidence because, although the witness stated that from the

apartment he shared with his girlfriend he saw defendant force his way into the victims' apartment, he did not live in the apartment across the street from the victims at the time they were murdered. Because neither the inmate nor his attorneys were aware of any of the issues at trial, the inmate alleged such facts as demonstrated that his claims were not procedurally barred under Miss. Code Ann. § 99-39-21(1); thus, the Supreme Court granted his petition to seek post-conviction relief as to that issue. *Manning v. State*, 884 So. 2d 717 (Miss. 2004).

It had long been established that a jury could not be instructed to disregard sympathy in toto in a capital case; because the inmate failed to object at trial and failed in his post-conviction relief petition to demonstrate that he was prejudiced by the district attorney's remarks to the jury regarding sympathy, the inmate was procedurally barred from raising that issue under Miss. Code Ann. § 99-39-21(1). *Manning v. State*, 884 So. 2d 717 (Miss. 2004).

Inmate's request for leave to file an application for post-conviction relief after the death sentence was imposed for rape and murder was denied because many of the inmate's claims were procedurally barred; claims involving an alleged taint to the jury pool, the cumulative effect of failure to object to prosecutorial comments, residual doubt, the vague nature of a pathologist's testimony, voir dire of prospective jurors concerning mitigation evidence, a limiting instruction on a statutory aggravating factor, the proportionality of the sentence, the sufficiency of the evidence, and a request for a neurological examination had all been previously litigated. *Holland v. State*, 878 So. 2d 1 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1590, 161 L. Ed. 2d 280 (2005).

Complaints raised by the inmate directly relating to the manner in which he was sentenced all existed immediately at the conclusion of the sentencing hearing and were, thus, appropriate matters for a direct appeal pursuant to Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act (Act); because the inmate did not take a

direct appeal, those issues were barred from consideration in a post-conviction relief proceeding pursuant to Miss. Code Ann. § 99-39-21(1) of the Act. *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. 2003), rev'd *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

Issues that were either presented through direct appeal or could have been presented on direct appeal or at trial are procedurally barred and cannot be relitigated under the guise of poor representation by counsel. *Wilcher v. State*, 863 So. 2d 719 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

In a post-conviction proceeding, an inmate was procedurally barred from arguing ineffective assistance of trial counsel because the inmate had a meaningful opportunity on direct appeal to claim the trial counsel had erred where the inmate, convicted for burglary of a dwelling, had burglarized a vacant house belonging to a nursing home resident, which, inmate claimed, was not a "dwelling," a claim without merit given the intent to maintain the house for dwelling purposes. *Sheffield v. State*, 881 So. 2d 249 (Miss. Ct. App. 2003).

State failed to meet the burden for imposing a procedural bar on a petitioner's Brady violation claim where it was uncertain whether the petitioner had knowledge during his trial of a police officer's undisclosed testimony in another trial, thus making the issue capable of review on direct appeal. *Simon v. State*, 857 So. 2d 668 (Miss. 2003), cert. denied, 541 U.S. 977, 124 S. Ct. 1885, 158 L. Ed. 2d 475 (2004).

Double jeopardy issue was procedurally barred where a jury was deadlocked on the issue of the death penalty as to the murder of one victim but the death penalty was imposed after a second trial as to three other victims. *Simon v. State*, 857 So. 2d 668 (Miss. 2003), cert. denied, 541 U.S. 977, 124 S. Ct. 1885, 158 L. Ed. 2d 475 (2004).

In a capital murder case, defendant's claim that the trial court erred in granting a jury instruction was barred pursuant to Miss. Code Ann. § 99-39-21(2) because arguing different theories on post-convic-



tion review were barred absent a showing of cause and actual prejudice. *Walker v. State*, 863 So. 2d 1 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004).

Petitioner's argument that his five year sentence of probation was illegal was not raised at the time he was sentenced; as such, he waived consideration of the claim on a motion for post-conviction relief or on appeal from the denial therefrom. *Payton v. State*, 845 So. 2d 713 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003), cert. denied, 540 U.S. 1078, 124 S. Ct. 931, 157 L. Ed. 2d 751 (2003).

Where each of defendant's direct complaints regarding the manner in which he was sentenced could and should have been the subject of a direct appeal, where defendant failed to take such an appeal, those issues were barred from consideration in a post-conviction relief proceeding; nevertheless, different considerations arose when those same complaints in regard to defendant's sentencing were viewed in light of his additional complaint that he was denied effective representation of counsel, at least during the sentencing phase of the circuit court proceedings. *Swindle v. State*, 881 So. 2d 281 (Miss. Ct. App. Jan. 21, 2003), rev'd on other grounds, *Swidle v. State*, 881 So. 2d 174 (Miss. 2004).

Where a petitioner failed to object to jury instructions both during trial and on appeal, his claim of error was barred by Miss. Code Ann. § 99-39-21(1), and since he did not show actual prejudice, his failure constituted a waiver and he was procedurally barred from raising this issue. *Woodward v. State*, 843 So. 2d 1 (Miss. 2003).

Petitioner's claims in his post-conviction petition that he was denied a fair trial because he was allegedly seen in shackles by the jurors, and that a jury instruction was improper, were not raised at trial or on direct appeal and were therefore procedurally barred from collateral review pursuant to Miss. Code Ann. § 99-39-21(1). *McGilberry v. State*, 843 So. 2d 21 (Miss. 2003).

Defendant's motion was procedurally barred where his failure to raise a claim either at trial or on direct appeal was a

procedural bar to the consideration of that claim. *Hires v. State*, 856 So. 2d 438 (Miss. Ct. App. 2003).

In a case where the defendant did not object at sentencing concerning an alleged disparity among the sentences given to his co-conspirators, the issue was procedurally barred for purposes of an appeal. *Collins v. State*, 822 So. 2d 364 (Miss. Ct. App. 2002).

In a post-conviction relief case, appellant's claim that he was denied due process because he was never arraigned and his right to a speedy trial was violated failed; the record appellant submitted on appeal contained no evidence of whether appellant was arraigned or when, or the number of days he waited after arrest for the plea hearing. *Brooks v. State*, 832 So. 2d 607 (Miss. Ct. App. 2002).

The defendant was procedurally barred from raising a claim that he was denied due process of the law based on each count in the bill of information ending with the words "against the peace and dignity of the State", as he had failed to raise the issue for a decision before the lower court. *McCullen v. State*, 786 So. 2d 1069 (Miss. Ct. App. 2001).

The doctrines of "different state or federal legal theories" and *res judicata* did not bar the claim that the trial court committed fundamental error by failing to instruct the jury on the elements of robbery in a prosecution for capital murder while engaged in the commission of the crime of robbery since the defendant demonstrated actual prejudice to overcome such procedural bar on the basis of prior cases which called for automatic reversal. *Ballenger v. State*, 761 So. 2d 214 (Miss. 2000).

The defendant was procedurally barred from asserting a claim based on ineffective assistance of counsel where it was not first alleged on appeal to the trial court. *Walton v. State*, 752 So. 2d 452 (Miss. Ct. App. 1999).

Because the issue could have been, but was not, raised at the time of the plea and sentencing, the defendant was procedurally barred from arguing that the trial court erred in sentencing him to serve four concurrent 10 year sentences for four counts of armed robberies to which he



pled guilty, while his co-defendant only received six years for one count of armed robbery, to which he as well pled guilty. *Henley v. State*, 749 So. 2d 246 (Miss. Ct. App. 1999).

The defendant was procedurally barred from arguing that his convictions on four armed robbery counts violated double jeopardy where he was presented with the opportunity to raise any objections, defenses, claims, questions, issues, or errors in either fact or law at his plea and sentencing, but chose not to do so. *Henley v. State*, 749 So. 2d 246 (Miss. Ct. App. 1999).

Where the defendant failed to raise the issue of his status as a habitual offender during his plea colloquy, he was procedurally barred from making such claim under subsection (1). *Tobias v. State*, 724 So. 2d 972 (Ct. App. 1998).

Habeas petitioner failed to show that state statute providing for procedural bar to raising constitutional claims that were not raised at trial or on direct appeal was not strictly or regularly applied by state, and statute thus precluded federal habeas review of petitioner's claims that were barred under that statute. *Stokes v. Anderson*, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

State statute providing that state supreme court was to deny application to proceed on motion for postconviction relief, unless it appeared from face of application, motion, exhibits, exhibits and prior record that postconviction claims were not procedurally barred under separate statute and that they further presented substantial showing of denial of state or federal right, could not operate as procedural bar to federal habeas review, because it required some evaluation of merits of applicant's claims and was not separate from merits of habeas claim. *Stokes v. Anderson*, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Habeas petitioner's assertion that it was error of state law for manslaughter instruction not to be given in capital murder case was procedurally barred from review by federal district court where issue was not presented until defendant's

appeal of denial of second motion for post-conviction relief and state Supreme Court determined issue was procedurally barred by failure to raise it previously and by three-year time bar in state Uniform Post-Conviction Collateral Relief Act; furthermore, any error was state law error and did not result in federal constitutional violation, and defendant failed to demonstrate sufficient reason for failure to present claim to state courts in procedurally proper manner. *Lockett v. Puckett*, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

All issues presented by defendant in motion for postconviction relief were procedurally barred, where she failed to raise them when she confessed to state's petition to adjudicate guilt, when she was sentenced, or during appearances before trial court on petition to reconsider sentence. *Jennings v. State*, 700 So. 2d 1326 (Miss. 1997).

Statement by Mississippi Supreme Court that inmate's habeas claims were barred by state Uniform Postconviction Collateral Relief Act and failed to present substantial showing of denial of state or federal right was plain statement that state's review of claim was procedurally barred, as required for district court to deny federal habeas review based on state procedural ground. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

Under Mississippi law, failure to raise ineffective assistance of counsel claim on direct review does not constitute procedural bar where litigant was represented by same counsel at trial and on direct appeal. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

Habeas corpus petitioner failed to demonstrate that Mississippi's direct appeal bar was not strictly and directly applied near time of petitioner's direct appeal to cases involving speedy trial claims direct appeal raised for first time on collateral review, as required to render bar inadequate as procedural bar. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

Habeas corpus petitioner failed to show cause for procedural default of his speedy trial claim, where he failed to demonstrate any objective external factor that

impeded his counsel's ability to raise speedy trial challenge on direct appeal, and he failed to allege that his counsel's failure to raise challenge was product of ineffective assistance of counsel. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

To establish "cause" for procedural default, party is required to show that some objective external factor impeded defense counsel's ability to comply with state's procedural rules or to show prior determination of ineffective assistance of counsel. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

Post-Conviction Collateral Relief Act provides procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Procedural bars of waiver, different theories, and res judicata and exception thereto as defined in postconviction relief statute are applicable in death penalty postconviction relief application. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Other issues which were either presented through direct appeal or could have been presented on direct appeal or at trial are procedurally barred on postconviction relief motion and cannot be relitigated under guise of poor representation by counsel. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue of whether defendant's proposed instruction as to manslaughter was improperly denied, as issue should have been raised on direct appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue, which was raised or should have been raised at trial or in

direct appeal, as to whether defense counsel's failure to object to aggravating circumstances at penalty phase constituted ineffective assistance of counsel; procedural bar applied to aggravating circumstances, which did not get special treatment. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief contention that, under totality of the circumstances, defense counsel provided ineffective assistance of counsel in failing to properly preserve claims in trial court of numerous issues of judicial and prosecutorial misconduct, as Supreme Court had addressed on direct appeal allegation that cumulative error required reversal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Postconviction movant was procedurally barred from raising issue as to propriety of prospective application of Willie case, holding that jury could not be instructed on both robbery and pecuniary gain as separate aggravating circumstances in murder prosecution, where movant had argued on direct appeal that pecuniary gain aggravator was vague and overbroad and therefore should not have been submitted as separate aggravator. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Where defendant had meaningful opportunity to raise issue of ineffective trial counsel on direct appeal and showed neither cause nor actual prejudice, he was procedurally barred by waiver from asserting it through petition for postconviction relief. *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

Although Supreme Court need not look further after finding procedural bar, Court may, alternatively, review merits of underlying claim knowing that any subsequent review will stand on the bar alone. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In capital case, Supreme Court would apply procedural bar to each issue waived



by defendant but would, alternatively, address each of those issues on the merits. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Claim of error in submission of aggravating circumstance that capital offense was committed while defendant was engaged in the commission of sexual battery was waived, despite defendant's claim that it could not be procedurally barred because the Supreme Court has refused to apply the bar to aggravating circumstances and that the Court has a statutory obligation to consider possible sentencing errors not raised by defendant or objected to at trial. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Postconviction relief is not granted upon facts and issues which could or should have been litigated at trial or on appeal. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Procedural bars of waiver, different theories, and res judicata and exception thereto as defined in postconviction relief statute are applicable in death penalty postconviction relief applications. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Doctrines of res judicata and waiver barred capital murder defendant's postconviction claims that his alleged mental retardation prevented him from giving free and voluntary confession and from understanding his Miranda rights, where only issue raised on direct appeal concerning defendant's confession was whether he was effectively prevented from making jury arguments about confession's credibility, and it was clear that defendant's low intelligence level was considered during suppression hearing in determining voluntariness of his confession. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Habeas corpus petitioner's claim of ineffective assistance of counsel at trial and on appeal, raised for first time in his second federal habeas petition, is procedurally barred by this section, as all claims for ineffective assistance of counsel originated from trial record and could have been discerned solely from examination of trial transcript. *Evans v. Thigpen*, 683 F. Supp. 1079 (S.D. Miss. 1987),

adopted, 821 F.2d 1065 (5th Cir. 1987), cert. denied, 483 U.S. 1035, 108 S. Ct. 5, 97 L. Ed. 2d 795 (1987).

Claims raised by petition for post conviction relief, which were procedurally barred because they could have been determined at trial or on direct appeal, were: conviction and sentence premised on unconstitutional statutes, double jeopardy, presentation of incompetent testimony, deprivation of defendant's right to testify in his own behalf, exclusion of exculpatory evidence, failure to grant change of venue, judicial misconduct, and unreliable identification. *Mann v. State*, 490 So. 2d 910 (Miss. 1986).

#### 4. Exclusion of blacks from jury.

Failure of habeas corpus petitioner to raise claim concerning exclusion of blacks from jury by prosecutor at sentencing trial, or on appeal or on first state postconviction collateral relief request waived such claim and is procedurally barred from raising such claim in subsequent appeals, as petitioner did not show sufficient "cause" for failing to raise this claim earlier even though petitioner had knowledge of peremptory strikes and knowledge of what it took to establish violation at time of trial and on appeal, despite petitioner's allegations that he did not have knowledge of prosecutor's systematic exclusion of blacks until article appeared in newspaper and until deposition for another trial was given by district attorney. *Evans v. Thigpen*, 683 F. Supp. 1079 (S.D. Miss. 1987), adopted, 821 F.2d 1065 (5th Cir. 1987), cert. denied, 483 U.S. 1035, 108 S. Ct. 5, 97 L. Ed. 2d 795 (1987).

Prisoner did not show sufficient "cause" for failure to object to exclusion of blacks at sentencing trial, where prisoner had knowledge of peremptory strikes and knowledge of what it took to preserve objection at time of trial and on appeal. *Evans v. Thigpen*, 683 F. Supp. 1079 (S.D. Miss. 1987), adopted, 821 F.2d 1065 (5th Cir. 1987), cert. denied, 483 U.S. 1035, 108 S. Ct. 5, 97 L. Ed. 2d 795 (1987).

A petitioner seeking to vacate or set aside his judgment of conviction and sentence of death could not successfully raise for the first time the issue of exclusion of blacks from the jury where more than 4 years had elapsed since the date the guilty



plead had been entered, the sentencing jury impaneled, and the death sentence imposed, and, in the interim, at least 3 different sets of counsel had worked on the case. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

### 5. Collateral estoppel.

A final decision of an issue on its merits is normally preclusive only if there is identity of parties from one suit to the next, and of their capacities as well; but privity, or a relationship similar to privity, is still required to obtain preclusive effect of collateral estoppel. *American Cas. Co. v. United S. Bank*, 950 F.2d 250 (5th Cir. 1992).

Collateral estoppel binds those who have already had their day in court regarding particular issue. Any other application of it would result in denial of due process for those who were neither party nor privity to prior action. *American Cas. Co. v. United S. Bank*, 950 F.2d 250 (5th Cir. 1992).

On basis of record in particular case, determination of whether insurance company was in privity, or in relationship similar to privity, with party to earlier state action would be too tenuous to support summary judgment, and genuine issues of material fact existed to be tried. *American Cas. Co. v. United S. Bank*, 950 F.2d 250 (5th Cir. 1992).

### 6. Res judicata.

Res judicata barred an individual's claims of mental retardation and ineffective assistance of trial counsel as those claims had been considered on the merits on direct appeal, and the individual had not complied with the procedures set forth in case law to raise a mental retardation claim. *Branch v. State*, — So. 2d —, 2007 Miss. LEXIS 276 (Miss. May 17, 2007).

Individual's claims regarding admission of victim impact testimony, the refusal to issue certain death sentence instructions, and ineffective assistance of counsel claims were procedurally barred under Miss. Code Ann. § 99-39-21(3) where the issues were identical, almost verbatim, to the issues raised on direct appeal. *Branch v. State*, — So. 2d —, 2007 Miss. LEXIS 276 (Miss. May 17, 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because the supreme court's review of the proportionality of the death sentence on direct appeal was not inadequate. Miss. Code Ann. § 99-19-105(3); first, the issue was procedurally barred because it had already been decided; and second, the supreme court once again found that the sentence imposed was not disproportionate because, in his course of robbing two stores, the inmate killed two men without provocation. *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

Court denied defendant's petition for post-conviction relief after defendant was convicted of capital murder and sentenced for death when res judicata under Miss. Code Ann. § 99-39-21(3) barred the claims about prosecutorial misconduct, evidentiary rulings like the admission of prior bad acts, jury instructions, and ineffective counsel that were raised in defendant's direct appeal. *Hodges v. State*, 949 So. 2d 706 (Miss. 2006).

Because the appellate court had already held it was reasonable to conclude that defendant repeatedly ran over the victim's body in order to disguise the injuries he had already inflicted and that there was sufficient evidence that the murder was committed in an effort to avoid lawful arrest, defendant could not recast the same issue as ineffective assistance of counsel; the issue was procedurally barred from further consideration on collateral review by the doctrine of res judicata. Miss. Code Ann. § 99-39-21(3). *Mitchell v. State*, 886 So. 2d 704 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1982, 161 L. Ed. 2d 864 (2005).

Prisoner's claim that waiver of the sentencing jury and the imposition of a sentence of death by the trial court violated Miss. Code Ann. § 99-19-101 was barred from relitigation by Miss. Code Ann. § 99-39-21(3) and was without merit. *Bishop v. State*, 882 So. 2d 135 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1401, 161 L. Ed. 2d 194 (2005).

Where defendant argued during a hearing on a motion to suppress his statements that was decided against him, that the State had delayed filing formal

charges in an attempt to extract a confession from him, and later raised the same issue in a direct appeal and a petition for a writ of certiorari in the United States Supreme Court, his claim in a postconviction relief petition was barred by *res judicata* and procedurally barred from relitigation under Miss. Code Ann. § 99-39-21(3). *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Denial of the inmate's motion for leave to proceed with a petition for postconviction relief in the trial court was proper, where his argument that a videotape expressing his remorse should have been admitted was barred by *res judicata*. *Simmons v. State*, 869 So. 2d 995 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 436, 160 L. Ed. 2d 325 (2004).

As an inmate's claims raised in his application for leave to seek postconviction relief had been considered and rejected on direct appeal pursuant to Miss. Code Ann. § 99-39-21(3), *res judicata* barred further consideration of them, and his death sentences were allowed to stand. *Stevens v. State*, 867 So. 2d 219 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 222, 160 L. Ed. 2d 96 (2004).

Claims of ineffective assistance of counsel was barred from review by the doctrine of *res judicata* because the underlying issues had been resolved on direct appeal. *Simon v. State*, 857 So. 2d 668 (Miss. 2003), cert. denied, 541 U.S. 977, 124 S. Ct. 1885, 158 L. Ed. 2d 475 (2004).

In a capital murder case, defendant's petition for postconviction relief was denied as the supreme court had already addressed the merits on direct appeal of his underlying ineffectiveness of counsel claims, which were found to be without merit; thus, defendant could not show the requisite deficient performance and resulting prejudice necessary to establish the ineffective assistance claims and they were *res judicata*. *Walker v. State*, 863 So. 2d 1 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004).

Although all of petitioner death row inmate's arguments were procedurally barred either by *res judicata* or for failure to raise the arguments earlier, and no intervening case law exempted petitioner

from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. *Jackson v. State*, 860 So. 2d 653 (Miss. 2003).

Petitioner's claim in his second postconviction petition that his counsel were ineffective during the culpability phase of his trial was barred by the doctrine of *res judicata*, Miss. Code Ann. § 99-39-21(3), as that claim had been raised and rejected on direct appeal and in his first postconviction petition. *Woodward v. State*, 843 So. 2d 1 (Miss. 2003).

There had been probable cause to arrest a petitioner for murder, as he was the only surviving member of his family, his murdered half-sister's car was missing, and petitioner's car had not been. As this issue was correctly decided on direct appeal, it was procedurally barred in his postconviction petition under the doctrine of *res judicata*, Miss. Code Ann. § 99-39-21(3). *McGilberry v. State*, 843 So. 2d 21 (Miss. 2003).

The defendant was barred from arguing that he was improperly denied a mistrial after three members of the venire questioned the trial judge about the possibility of parole if the defendant were sentenced to life in prison since this issue was argued on direct appeal. *Wiley v. State*, 750 So. 2d 1193 (Miss. 1999), cert. denied, 530 U.S. 1275, 120 S. Ct. 2742, 147 L. Ed. 1007 (2000).

Postconviction relief petitioner's claim that trial court erred in excluding expert testimony offered to show that, because of petitioner's mental retardation, he could not have made knowing, intelligent or voluntary waiver of his right to testify was barred by *res judicata*, particularly as petitioner had been found competent to stand trial, and all evidence presented was merely cumulative; petitioner's claim went to his overall competence to stand trial and could not be separated to encompass only issue of exclusion of expert testimony. *Neal v. State*, 687 So. 2d 1180



(Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Procedural bars of waiver, different theories, and res judicata and exception thereto as defined in postconviction relief statute are applicable in death penalty postconviction relief application. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Postconviction relief is not granted upon facts and issues which could or should have been litigated at trial and on appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue of whether defendant's proposed instruction as to manslaughter was improperly denied, as issue should have been raised on direct appeal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief contention that, under totality of the circumstances, defense counsel provided ineffective assistance of counsel in failing to properly preserve claims in trial court of numerous issues of judicial and prosecutorial misconduct, as Supreme Court had addressed on direct appeal allegation that cumulative error required reversal. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Res judicata procedurally barred petitioner from challenging capital sentence under Post-Conviction Collateral Relief Act where issue of prosecution's alleged undisclosed plea bargain for coindictee's testimony, which formed basis of petitioner's challenge, had been raised in petitioner's motion for new trial, was capable of determination at that point, and in fact was litigated and adjudicated to be without merit. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Doctrine of res judicata barred capital murder defendant's postconviction claims

of prosecutorial misconduct, where there was no contemporaneous objection. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Parties will be precluded from relitigating a specific issue which was actually litigated in former action, determined by former action, and essential to judgment in former action. *American Cas. Co. v. United S. Bank*, 950 F.2d 250 (5th Cir. 1992).

A capital murder defendant's claim that the trial court failed to properly instruct the jury regarding the prosecution's plea bargain with an accomplice, which would have impeached the accomplice's credibility as a witness, was barred by res judicata in its common law and statutory forms, where the defendant did not request such an instruction during the trial, the proceedings on direct appeal did not reflect mention of the points, and there were no grounds for serious doubt that the defendant was legally guilty of capital murder. *Culberson v. State*, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

Court does not consider on petition for relief under Mississippi Uniform Post-Conviction Collateral Relief Act issues raised and decided on original appeal, even though theories for relief different from those urged at trial and on appeal are asserted. Because court considered points on their merits on direct appeals, defendant could not be allowed to relitigate same issues. *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Application for leave to file motion to vacate judgment in death sentence was denied where all points presented in the application either had been disposed of by prior adjudication making them res judicata, or, had been raised at trial or in prior appeals and were procedurally barred, and many of the points were unsupported by legal authority. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

Although rephrased, issues which were addressed on direct appeal were barred by



res judicata on motion to vacate sentence and judgment. *Rideout v. State*, 496 So. 2d 667 (Miss. 1986).

Since, on direct appeal, petitioner had challenged the weight and sufficiency of the evidence, the judgment affirming his conviction rendered the evidence issue res judicata, and it could not be relitigated by petition for post conviction relief. *Mann v. State*, 490 So. 2d 910 (Miss. 1986).

#### 7. Burden of proof.

To receive hearing on claim of ineffective assistance of counsel, postconviction relief applicant to Supreme Court must demonstrate with specificity and detail the elements of claim. *Foster v. State*, 687

So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In order to prevail on a claim that counsel's assistance was so defective as to require reversal of conviction or death sentence, defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Evans v. State*, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

**Cited in** *Barnes v. State*, 920 So. 2d 1019 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008 (Miss. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005), cert. denied, 926 So. 2d 922 (Miss. 2006).

### RESEARCH REFERENCES

**ALR.** Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Post conviction relief. 57 Miss. L. J. 524, August, 1987.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 99-39-23. Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof; appointment of postconviction counsel in death penalty cases.

(1) If an evidentiary hearing is required the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under Section 99-15-15, Mississippi Code of 1972.

(2) The hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.

(3) The parties shall be entitled to subpoena witnesses and compel their attendance, including, but not being limited to, subpoenas duces tecum.

(4) The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the prisoner brought before it for the hearing.

(5) If the court finds in favor of the prisoner, it shall enter an appropriate order with respect to the conviction or sentence under attack, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.

(6) The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed pursuant to Section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence of death. A dismissal or denial of a motion relating to insanity under Section 99-19-57(2), Mississippi Code of 1972, shall be *res judicata* on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(7) No relief shall be granted under this article unless the prisoner proves by a preponderance of the evidence that he is entitled to such.

(8) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(9) In cases resulting in a sentence of death and upon a determination of indigence, appointment of post-conviction counsel shall be made by the Office of Capital Post-Conviction Counsel upon order entered by the Supreme Court promptly upon announcement of the decision on direct appeal affirming the sentence of death. The order shall direct the trial court to immediately determine indigence and whether the inmate will accept counsel.

**SOURCES:** Laws, 1984, ch. 378, § 12; Laws, 1995, ch. 566, § 5; Laws, 2000, ch. 569, § 13, *eff from and after July 1, 2000*.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to "this chapter" was changed to "this article." The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Editor's Note** — Laws, 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.'"

Sections 1 through 10 of Laws, 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Filing of motion to proceed in trial court for further proceedings, see § 99-39-27.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Evidentiary hearing, generally.
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9. Habeas corpus.
10. Relief denied.

**1. In general.**

Denial of the inmate's petition for post-conviction relief was appropriate because he failed to meet his burden of proof contained in Miss. Code Ann. § 99-39-23(7); the appellate court agreed that there was no confusion as to his understanding of his plea and sentence; he signed the petition to enter a plea of guilty and acknowledged his signature to it at the plea hearing. *Harris v. State*, 944 So. 2d 900 (Miss. Ct. App. 2006).

Where an inmate filed a petition for a writ of habeas corpus and was seeking for his sentence to be corrected, the petition was treated as a petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-5. As the inmate had previously filed a petition for post-conviction relief the year before, the present writ was barred as a successive writ under Miss. Code Ann. § 99-39-23 (6). *Bynum v. State*, — So. 2d —, 2005 Miss. App. LEXIS 460 (Miss. Ct. App. July 19, 2005).

Defendant's second motion for post-conviction relief was barred as a successive writ. Defendant's failure to perfect an appeal after the first petition was denied was due to his lack of funds and not his attorney's performance. *Joshua v. State*, 913 So. 2d 1062 (Miss. Ct. App. 2005).

Denial of the inmate's post-conviction motion to vacate an illegal sentence was proper pursuant to Miss. Code Ann. 99-39-23(6) where he did not raise the issue of an illegal sentence in his first petition for post-conviction relief but could have. Thus, the issue was barred by Miss. Code Ann. § 99-39-21(1). *Bradley v. State*, 919 So. 2d 1062 (Miss. Ct. App. 2005).

Miss. Code Ann. § 99-39-23 barred successive motions for post-conviction relief; although exceptions to the bar existed, defendant failed to plead any facts that would have made any of the exceptions applicable to the issues raised in the appeal; therefore, he was procedurally barred from raising the issues in the appeal, and the appellate court would not consider any of them. *Walker v. State*, 910 So. 2d 584 (Miss. Ct. App. 2005).

Defendant's petition for post-conviction relief was properly denied where defendant failed to prove that his guilty plea was not voluntarily or intelligently entered, or to reference any action by his court-appointed counsel that was deficient or in any way prejudiced his defense. *Jones v. State*, 904 So. 2d 1107 (Miss. Ct. App. — 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Where petitioner raped and murdered a 79-year-old victim, the burden was upon petitioner to prove that he was mentally retarded to such an extent as to avoid the death penalty. Where his IQ score of 81 placed him in the category of "low dull normal," and well above the maximum score for "mild" mental retardation, imposition of the death penalty was not cruel and unusual punishment; further, the jury instructions given at the sentencing phase, in accordance with Miss. Code Ann. § 99-19-101(7), did not violate petitioner's Eighth Amendment rights since the factors contained in § 99-19-101(7) required that the jury find the requisite intent set forth in *Enmund* and *Tison* before a death penalty verdict could be returned. *Gray v. State*, 887 So. 2d 158 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Defendant's argument that counsel coerced defendant into pleading guilty was directly contradicted by the record, which showed that the trial judge asked defendant specifically about whether defendant had been coerced or threatened into pleading guilty, and defendant responded in the negative; thus defendant's plea was voluntary, there was no showing that counsel was ineffective, and defendant's petition for post-conviction relief was properly de-



nied. *Roby v. State*, 861 So. 2d 368 (Miss. Ct. App. 2003).

Regarding execution and mentally retarded offenders, the burden of proof is on the offender to prove that he is mentally retarded. *Russell v. State*, 849 So. 2d 95 (Miss. 2003).

Defendant's plea was given voluntarily where defendant signed a sworn statement that acknowledged that he was pleading guilty as a habitual offender and that acknowledged the maximum and minimum sentences as well as the maximum and minimum fine he could receive; defendant's claims in his motion for post-conviction relief were unsupported by affidavits or any other evidence, and they contradicted his sworn statements given before the court in his guilty plea. *Hargett v. State*, 864 So. 2d 283 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Where the inmate asserted in petition for post-conviction relief that the inmate had not pleaded guilty, but the inmate's signature appeared on a petition entering the guilty plea, the inmate failed to satisfy the inmate's burden under Miss. Code Ann. § 99-39-23(7) to prove by a preponderance of the evidence that the inmate was entitled to post-conviction relief, as the inmate's sworn signature carried a strong presumption of validity. *Atwell v. State*, 848 So. 2d 190 (Miss. Ct. App. 2003).

Defendant's claim in a motion for post-conviction relief that he was entitled to a new trial of two counts of robbery to which defendant had pleaded guilty based on newly discovered evidence could not be considered as the claim was being raised for the first time on appeal; defendant could, however raise the issue in a separate proceeding. *Donnelly v. State*, 841 So. 2d 207 (Miss. Ct. App. 2003).

Defendant seeking post-conviction relief following his conviction of two counts of transferring cocaine failed to sustain his burden of proving that his guilty pleas were involuntary because he had been the victim of a conspiracy to create a crime were none existed, that the State and his attorney had conspired to deprive defendant of his right to due process, and that his attorney had coerced him into plead-

ing guilty because counsel was not ready for trial. *Terry v. State*, 839 So. 2d 543 (Miss. Ct. App. 2002).

This section has no application to a request by a prisoner for a change in his location. *Rochell v. State*, 748 So. 2d 103 (Miss. 1999).

To demonstrate that he was entitled to out-of-time appeal, defendant was required to show by preponderance of the evidence that he asked his attorney to file appeal within time limit for doing so and that through no fault of defendant's, his attorney failed to file appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Defendant who signed statement indicating that his attorney had advised him of his right to appeal his conviction and sentence and that after discussing his case with his attorney, he did not wish to pursue appeal, was not entitled to file out-of-time appeal when he changed his mind nearly a year later. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Appropriate standard for trial court in reviewing postconviction motion for new trial is whether petitioner has proved by a preponderance of evidence that material facts exist which had not previously been heard and which require vacation of conviction or sentence. *Turner v. State*, 673 So. 2d 382 (Miss. 1996).

Recanting affidavit of coindictor who testified against capital murder defendant did not undermine confidence in outcome of original verdict against defendant so as to warrant new trial, despite allegation that prosecution entered into undisclosed plea bargain for coindictor's testimony, where coindictor recanted testimony but stated that testimony had been "colored" rather than perjured, coindictor later recanted his recantation of his testimony by repeatedly stating in hearing on motion for new trial that he had "no deal" with prosecution, coindictor's testimony during hearing corroborated the testimony of 3 prosecutors, one of coindictor's attorneys submitted affidavit 6 years after the fact stating that there had been plea bargain, coindictor's co-counsel stated in side bar at hearing that he was unaware of any plea agreements and same attorney never

executed any affidavit confirming or denying existence of plea bargain, there was no written plea bargain agreement in the record, and it would have been unusual for coindictee to agree to 5 year sentence in exchange for his testimony when maximum sentence faced by coindictee was 5 years. *Williams v. State*, 669 So. 2d 44 (Miss. 1996).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to postconviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

## 2. Evidentiary hearing, generally.

Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing, Miss. Code Ann. § 99-39-23, as there was evidence that may have changed the outcome of a jury trial; the voluntariness and knowledge of defendant's guilty plea were in doubt and had to be addressed in the evidentiary hearing. *Hannah v. State*, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006).

Defendant did not present any affidavits to substantiate his claim that his trial counsel forced him to plead guilty, nor did he offer any evidence of this claim when he had an opportunity to do so before the trial court. It appeared quite clear that defendant was forced to go to trial not by anything that his lawyer said or did but by the trial court's refusal to give him a last minute continuance; thus, defendant was not entitled to present evidence on his ineffective assistance claim during the hearing on his motion to vacate judgment and sentence. *Willcutt v. State*, 910 So. 2d 1189 (Miss. Ct. App. 2005).

Successive application for post-conviction relief of a death row inmate who claimed to be mentally retarded was granted in part; an evidentiary hearing was ordered at which the inmate would be obliged to prove he met the applicable standard of mental retardation by a preponderance of the evidence. *Foster v. State*, 848 So. 2d 172 (Miss. 2003).

In defendant's capital murder case, defendant produced enough evidence to be granted leave to proceed with a petition for post-conviction relief in the trial court on the issue of his mental retardation where he submitted expert testimony regarding his low IQ level. *Goodin v. State*, 856 So. 2d 267 (Miss. 2003), cert. denied, 541 U.S. 947, 124 S. Ct. 1681, 158 L. Ed. 2d 375 (2004).

Defendant who signed statement indicating that his attorney had advised him of his right to appeal his conviction and sentence and that after discussing his case with his attorney, he did not wish to pursue appeal, was not entitled to file out-of-time appeal when he changed his mind nearly a year later. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Trial court did not use erroneous legal standard in denying relief to postconviction relief petitioner, despite claim that court erroneously applied harmless error analysis, rather than holding petitioner to burden of proof by preponderance of evidence; while court did find that if petitioner had been denied right to testify under circumstances, it would have been harmless error, and did not specifically state what petitioner's burden of proof was, court stated that there was "absolutely no proof that the Defendant was denied the right to testify," and went on to hold that as matter of law petitioner had failed to meet his burden of proof under Postconviction Collateral Relief Act. *Neal v. State*, 687 So. 2d 1180 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Fact that friend of postconviction petitioner's family came forward and confessed after statute of limitations for crime had run was not new evidence entitling petitioner to a new trial on drug charges, particularly when testimony revealed that many drug transactions tran-



spired daily in the area, and friend could not say that drug transactions with which he was involved were transactions for which petitioner was convicted. *Turner v. State*, 673 So. 2d 382 (Miss. 1996).

A postconviction relief petitioner who claimed he was not competent to be executed bore the burden of showing by a preponderance of the evidence that, at the time of the hearing, he was not competent; even after he made the threshold showing that entitled him to proceed in trial court under § 99-39-27, he faced a presumption that he was sane and competent to be executed. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

Upon remand of case for evidentiary hearing pursuant to this section, if defendant proves, by a preponderance of the evidence, that he, within the time for filing notice of appeal, asked his attorney to appeal, and that his attorney, through no fault of the defendant, failed to appeal, then the motion for out-of-time appeal should be granted, and counsel should be appointed to represent the defendant for purposes of the appeal. *Barnett v. State*, 497 So. 2d 443 (Miss. 1986).

### 3. —Advising defendant of rights upon guilty plea.

Where defendant failed to show that a guilty plea was involuntary under former Miss. Unif. Cir. & County Ct. Prac. R. 3.03(2) [currently 8.04(3)], and Miss. Code Ann. § 99-39-23 and waived the right to object to the alleged illegality of the search of a vehicle, the trial court's findings were not clearly erroneous. *Young v. State*, 859 So. 2d 1025 (Miss. Ct. App. 2003).

A defendant was entitled to an evidentiary hearing pursuant to § 99-39-13 through this section on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading

guilty. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

### 4. Timeliness.

Where defendant was found guilty of selling cocaine and later pled guilty to two other charges, defendant failed to prove that he was entitled to an out-of-time appeal from the first conviction under Miss. Code Ann. § 99-39-5; although defendant initially wanted to appeal his first conviction, he changed his mind as a result of a plea agreement. *Andrews v. State*, 923 So. 2d 239 (Miss. Ct. App. 2006).

Court did not err in denying defendant's motion to supplement his petition for postconviction relief because defendant's attempt to do so over four and a half years after the trial court's denial of that petition was, in effect, a successive motion that was procedurally barred under Miss. Code Ann. § 99-39-23(6). *Sanchez v. State*, 913 So. 2d 1024 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008 (Miss. 2005).

Defendant's petition seeking post-conviction relief was barred under the successive writ prohibition, Miss. Code Ann. § 99-39-23(6), which states that a court order denying relief under this article is a final judgment and is conclusive until reversed, and as a result, such an order is a bar to a second or successive motion under this article; the record showed that defendant first filed a post-conviction petition on July 31, 2000, and the court denied relief, but defendant failed to appeal the denial, and as a consequence, that order was final and beyond review on a subsequent petition. *Kemp v. State*, 904 So. 2d 1162 (Miss. Ct. App. 2004).

Where the circuit court properly denied the inmate's petition for postconviction relief filed 10 years after his sentence was imposed because it was untimely, the inmate's second motion for postconviction relief was procedurally barred. *Jones v. State*, 897 So. 2d 195 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Defendant was barred from bringing a successive motion where defendant had previously brought more than one motion seeking relief and no timely appeal had been taken; defendant's motion did not fall within any applicable exception. *Hires*



v. State, 856 So. 2d 438 (Miss. Ct. App. 2003).

### 5. —Intervening decision.

Inmate's applications for post-conviction relief and for leave to file a motion to vacate the death sentence were denied as the inmate had already raised the argument of the "intervening decision" via a motion for rehearing and a separate motion for appointment of counsel and for litigation expenses; the inmate was essentially seeking a rehearing of that motion under the guise of a post-conviction claim by combining it with a "new" claim of ineffective assistance of counsel, which was prohibited by Miss. R. App. P. 27(h). *Wiley v. State*, 842 So. 2d 1280 (Miss. 2003).

The intervening decision exception to the 3-year statute of limitations set forth in § 99-39-5(2) and subsection (6) of this section applies only to those decisions that create new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction or during the 3-year period circumscribed by the statute of limitations; thus, in a proceeding regarding a petitioner's motion to vacate a guilty plea, the decision in *Vittitoe v. State* (Miss. 1990) 556 So. 2d 1062, which was based on the failure of the trial court to follow the mandates of Rule 3.03, Miss. Unif. Crim. R. Cir. Ct. Prac. when the defendant entered his guilty plea, did not qualify under the intervening decision exception because it simply recognized and applied a pre-existing rule that had been in existence for at least 4 years when the petitioner entered his guilty plea. *Patterson v. State*, 594 So. 2d 606 (Miss. 1992).

### 5.5. —Expiration of sentence.

The movant could not rely on the exception contained in subsection (6) for a case in which a prisoner claimed that his sentence would have expired. If it were not for an illegal habitual offender sentence, his rightful sentence would have expired had he received the non-habitual offender penalty. *Sneed v. State*, 722 So. 2d 1255 (Miss. 1998).

### 6. Right to appointed counsel.

Court erred under Miss. Code Ann. § 99-39-23(7) in denying defendant's mo-

tion for postconviction relief, which requested that he be allowed to file an out-of-time appeal after his appeal was dismissed for failure to pay costs, because his trial counsel had been appointed, indicating that he was indigent. The costs of his appeal should have been paid by the county. *Crump v. State*, 913 So. 2d 385 (Miss. Ct. App. 2005).

Inmate's right to counsel under Miss. Const. art. III, § 26 was not denied, where the inmate argued that the inmate was denied counsel at the evidentiary hearing on the inmate's post-conviction relief petition; the inmate had no right to counsel under the Miss. Const. art. III, § 26, and it was within the trial judge's discretion under Miss. Code Ann. § 99-39-23(1) whether to appoint counsel. *Putnam v. State*, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

The appellant, who was incarcerated in South Dakota, was entitled to appointed counsel because; (1) access to Mississippi case law materials was limited because the South Dakota prison facility did not maintain Mississippi law materials; (2) his requests for legal assistance to the Mississippi State Penitentiary Law Library were ignored, and the Mississippi State Law Library advised him to provide more detailed requests; and (3) he could not afford an attorney. *Unruh v. Puckett*, 716 So. 2d 636 (Miss. 1998).

A trial court did not err in failing to sua sponte appoint counsel for a postconviction relief petitioner at the evidentiary hearing, in spite of the petitioner's contention that it was clear that he lacked knowledge and understanding of the proceedings being conducted by the court. A criminal defendant has neither a state nor federal constitutional right to appointed counsel in postconviction proceedings. Additionally, the appointment of counsel at an evidentiary hearing is discretionary with the trial judge by virtue of subsection (1) of this section. *Moore v. State*, 587 So. 2d 1193 (Miss. 1991).

Neither Eighth Amendment nor Fourteenth Amendment due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief; considerations such

as those listed by District Court in instant case should not be treated as factual findings since such treatment could permit different constitutional rules to apply in different states; and District Court would be able on remand to remedy any alleged denial to death row inmates of adequate and timely access to prison library. *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).

### 7. Successive writ.

Appeal from the denial of post-conviction relief was not precluded by the successive writ bar in Miss. Code Ann. § 99-39-23(6) because, despite having two judgments on file, the record only contained one motion. *Parkman v. State*, 953 So. 2d 315 (Miss. Ct. App. 2007).

Second petition for post-conviction relief was properly dismissed because evidence that defendant might have not signed the waiver of arraignment and entry of plea form was not the type of new evidence contemplated by Miss. Code Ann. § 99-39-23(6). *Jones v. State*, 948 So. 2d 499 (Miss. Ct. App. 2007).

Defendant's third motion for post-conviction relief was properly denied in a capital murder case as a successive writ; because defendant's two previous motions for post-conviction relief had been denied, defendant's successive motion for post-conviction relief was barred under Miss. Code Ann. § 99-39-23(6). *Jordan v. State*, 935 So. 2d 1083 (Miss. Ct. App. 2006).

Pursuant to Miss. Code Ann. § 99-39-23(6), defendant's first attempt at post-conviction relief was properly denied and was the final judgment; defendant's second attempt was barred as alleged new evidence and was not appropriate under the facts presented as they were known at the time of his first petition for post-conviction relief. *Bowie v. State*, 949 So. 2d 60 (Miss. Ct. App. 2006).

An inmate's second claim for post-conviction relief was denied because it was time-barred and as a successive petition because the inmate made the same claims in the second petition that he made in the first claim. *Gatlin v. State*, 932 So. 2d 67 (Miss. Ct. App. 2006).

Motion for post-conviction relief was denied because it was a successive writ under Miss. Code Ann. § 99-39-23(6) due

to previous decisions in 1986, 1987, 1988, and 1997; the inmate failed to show that there were any intervening cases that permitted a hearing on the motion, as the inmate merely cited cases without accompanying argument. *Wildee v. State*, 930 So. 2d 478 (Miss. Ct. App. 2006).

Relief under Miss. Code Ann. § 99-39-5(2) and Miss. Code Ann. § 99-39-23(6) was properly denied because the exceptions to the procedural bars did not apply where a prisoner's failure to understand the law regarding jury instructions or effective assistance of counsel, until he later conducted research regarding his case, did not constitute newly discovered evidence and did not invoke the plain error rule. *Pickle v. State*, 942 So. 2d 243 (Miss. Ct. App. 2006).

Defendant's post-conviction petition was dismissed where he waived his right to a jury trial and had no standing to claim his right to a jury trial was violated, and the issue was barred as a successive writ; defendant did not prove that his claims were not barred as successive writs under Miss. Code Ann. § 99-39-23(7). *Carbin v. State*, 942 So. 2d 231 (Miss. Ct. App. 2006).

Following the denial of defendant's first motion for post-conviction relief from his sentences for two DUI convictions, he filed a motion to correct an illegal sentence; the second motion was treated as a motion for post-conviction relief and denied as a successive writ under Miss. Code Ann. § 99-39-23(6). *Smith v. State*, 923 So. 2d 241 (Miss. Ct. App. 2006).

Defendant's second motion for postconviction relief was properly dismissed pursuant to Miss. Code Ann. § 99-39-23(6) because no statutory exception was applicable; there was no intervening decision of either the Mississippi Supreme Court or the United States Supreme Court that would have a bearing on the outcome of the case, there was no newly discovered evidence, nor did he claim that his sentence had expired or that his probation, parole, or conditional release had been unlawfully revoked. *Gaston v. State*, 922 So. 2d 841 (Miss. Ct. App. 2006).

Trial court properly dismissed an inmate's motion for post-conviction relief as the inmate had previously filed a motion



for post-conviction relief that was denied; thus, the present motion was procedurally barred pursuant to Miss. Code Ann. § 99-39-23(6). *Arnold v. State*, 912 So. 2d 202 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the motion was the inmate's second motion for post-conviction relief and therefore was barred as a successive writ. *Keyes v. State*, 918 So. 2d 76 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of the inmate's successive motions for post-conviction relief as the issues raised in the successive motions had previously been raised and ruled upon in the inmate's first motion and under Miss. Code Ann. § 99-39-23(6), the denial of the first motion was a bar to successive motions. *Page v. State*, 918 So. 2d 853 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of defendant's petition for post-conviction relief as defendant had previously filed a petition for post-conviction relief that had been denied on appeal; thus, this appeal was denied as a successive writ under Miss. Code Ann. § 99-39-23(6). *Laushaw v. State*, 926 So. 2d 240 (Miss. Ct. App. 2005).

In defendant's appeal from the denial of his motion to correct the record regarding his 1975 aggravated assault conviction, even if defendant qualified for an exemption from the three-year bar under Miss. Code Ann. § 99-39-5 because of newly discovered evidence, his application would still have been barred by the successive writ bar provided in Miss. Code Ann. § 99-39-23(6). Since defendant had filed a prior motion to correct the record, his current application constituted a successive writ. *Smith v. State*, 918 So. 2d 850 (Miss. Ct. App. 2005).

When the trial court dismissed the inmate's first motion for post-conviction relief, that dismissal barred further pursuit of post-conviction relief in the trial court. Accordingly, the inmate was barred from filing his second motion for post-conviction relief unless he fit into two narrow exceptions; because the record did not contain a copy of the inmate's motion for relief, the appellate court had to assume that his petition did not meet the statu-

tory exceptions for successive motions for post-conviction relief. *Runnels v. State*, 919 So. 2d 1072 (Miss. Ct. App. 2005).

Issues raised in defendant's second motion for post-conviction collateral relief (PCR) under consideration were essentially the same as were considered by the courts in the his first PCR and appeal. Thus, his claims were procedurally barred based on the successive writ bar and res judicata; in addition, his second PCR motion was filed more than 10 years after his initial guilty plea and was procedurally barred, and because he filed his second PCR motion in the circuit court without first filing a motion with the supreme court for leave to file in the circuit court the trial court was without jurisdiction to consider said motion. *Sykes v. State*, 919 So. 2d 1064 (Miss. Ct. App. 2005).

Defendant's second petition for postconviction relief alleging that the revocation of his intensive supervision was illegal and that he was denied the effective assistance of counsel was barred by operation of law as a successive motion under Miss. Code Ann. § 99-39-23(6). *Taylor v. State*, 919 So. 2d 209 (Miss. Ct. App. 2005).

Where appellant filed two prior motions for post-conviction relief (PCR) that had been dismissed, the third PCR was barred as a successive writ. *Weathersby v. State*, 919 So. 2d 262 (Miss. Ct. App. 2005).

Inmate's motions for post-conviction relief were denied as successive and time barred because the inmate failed to show that any exceptions applied; a letter from a district attorney recommending a denial of parole did not constitute newly discovered evidence because it did not exist at the time of trial. *Garlotte v. State*, 915 So. 2d 460 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279 (Miss. 2005).

Where appellant filed a motion for post-conviction relief that was denied, and then filed a second motion for postconviction relief, the circuit court properly dismissed this motion as a successive writ. *Pearson v. State*, 906 So. 2d 788 (Miss. Ct. App. 2004).

Inmate's first motion for post-conviction relief was denied on February 16, 2001; thus, the inmate's second petition for post-conviction relief was properly dismissed on August 5, 2003, and in accordance with



Miss. Code Ann. § 99-39-23(6), his appeal was barred as a successive writ. *Black v. State*, 902 So. 2d 612 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Bar against successive filings applies not only to issues actually determined in a previous postconviction relief proceeding, but to those issues that could have been raised. *Jones v. State*, 897 So. 2d 195 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Where an inmate filed a second motion for postconviction relief following his pleas of guilty to murder and armed robbery, the affidavit of another prison stating that someone other than defendant had committed the crimes was not newly discovered evidence to justify a successive postconviction relief motion. Surely, the inmate knew whether he was guilty at the time he entered his plea. *Jones v. State*, 897 So. 2d 195 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Petitioner's second motion for post-conviction relief was properly denied as an impermissible second filing for relief under Miss. Code Ann. § 99-39-23(6) because petitioner's appeal from the denial of the first motion for postconviction relief was denied as untimely, and the decision denying the first petition had been left untouched. *Pinson v. State*, 881 So. 2d 348 (Miss. Ct. App. 2004).

Where an inmate filed a second petition to clarify sentence, and failed to demonstrate why the evidence that purportedly had cleared him of the crimes to which he had pleaded guilty was not available at the time of trial, the appellate court affirmed the denial of the inmate's petition for postconviction relief. *Donnelly v. State*, 887 So. 2d 833 (Miss. Ct. App. 2004).

Petitioner was properly denied post-conviction relief, because his petition was successive, as the record clearly indicated that petitioner had filed such a petition in 1993; the Supreme Court upheld the denial; petitioner failed to raise facts requiring consideration of the exceptions to the bar against successive petitions. *Truitt v. State*, 878 So. 2d 244 (Miss. Ct. App. 2004).

Defendant's issues were procedurally barred for the failure to: (1) timely appeal,

and (2) as a successive writ. On at least two occasions, in June 2002 and September 2002, defendant filed petitions requesting relief which could have been granted within the purview of the Mississippi Uniform Post-Conviction Collateral Relief Act pursuant to Miss. Code Ann. § 99-39-5. Those petitions for relief were denied and no appeals were taken, and the exceptions under Miss. Code Ann. § 99-39-23(6), allowing for the filing of a successive writ, did not apply. *Stone v. State*, 872 So. 2d 87 (Miss. Ct. App. 2004).

Even treating an inmate's appeal as an appeal from an order denying his second motion for post-conviction relief, the dismissal of the motion was affirmed because the filing of a second motion for second post-conviction relief motion was barred by Miss. Code Ann. § 99-39-23(6). *Torns v. State*, 866 So. 2d 486 (Miss. Ct. App. 2003).

Inmate's motion for post-conviction relief was barred under Miss. Code Ann. § 99-39-23(6) because it was not inmate's first motion for post-conviction relief. *Skinner v. State*, 864 So. 2d 298 (Miss. Ct. App. 2003).

Where defendant's post-conviction motion was successive under Miss. Code Ann. § 99-39-23(6) and was not preserved by a proper objection, the alleged mistake was clearly discoverable at sentencing as required by Miss. Code Ann. § 99-39-5(2), and the appeal was not properly supported because no part of Fed. R. Crim. P. 11 stated what defendant claimed on appeal; the motion was properly dismissed. *McGriggs v. State*, 877 So. 2d 447 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's second motion to correct a sentencing order was a successive Post-Conviction Collateral Relief Act motion barred by Miss. Code Ann. § 99-39-23, but as his motion involved a fundamental right, to be free of an illegal sentence, based on the trial court's allegedly exceeding its authority in sentencing him — the appellate court waived the procedural bar of § 99-39-23. *Norwood v. State*, 846 So. 2d 1048 (Miss. Ct. App. 2003).

Lacking a demonstration that the facts in defendant's third motion to withdraw his guilty plea were excepted from the

procedural bar for successive writs, the trial court did not err when it denied him relief and dismissed his motion. *Field v. State*, 856 So. 2d 492 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Defendant's petition seeking post-conviction relief from a conviction of manslaughter and aggravated assault entered upon defendant's guilty pleas was barred under either Miss. Code Ann. § 99-39-23 in a successive petition or under Miss. Code Ann. § 99-39-5 because the petition was not filed within three years of the conviction. *Green v. State*, 839 So. 2d 573 (Miss. Ct. App. 2003).

The Mississippi Post-Conviction Collateral Relief Act supplants prior statutory and rule versions of the writ of habeas corpus and, with a few exceptions, any order dismissing a prisoner's motion or otherwise denying relief is a final judgment and a bar to a second or successive motion. *Scott v. State*, 817 So. 2d 642 (Miss. Ct. App. 2002).

Defendant's allegation that he was prosecuted under a forged indictment raised a state constitutional violation which prevented his motion from being barred as a successive post-conviction relief motion under Miss. Code Ann. § 99-39-23(6). *Gray v. State*, 819 So. 2d 542 (Miss. Ct. App. 2001).

The defendant's claims that (1) he was coerced into pleading guilty by the prosecutor's off-the-record threat to indict him as a habitual offender if he did not so plead and that (2) his counsel was ineffective because the state's alleged failure to provide a speedy trial was not raised were not within any of the statutory exceptions and, therefore, the trial judge did not err in dismissing a successive motion for post-conviction relief. *Smith v. State*, 773 So. 2d 410 (Miss. Ct. App. 2000).

The defendant was barred from bringing a successive motion where he previously had brought an initial motion for post-conviction relief that was considered and denied by the circuit court and no timely appeal was taken from that order. *Wilson v. State*, 772 So. 2d 1093 (Miss. Ct. App. 2000).

The defendant failed to demonstrate that he fell within one of the exceptions of

the successive motion bar where he simply argued the merit of the trial court's summary denial of his second petition without regard to the procedural bar. *Tate v. State*, 806 So. 2d 276 (Miss. Ct. App. 2000).

A petition for postconviction relief was barred as a successive writ where the petitioner filed a motion for out of time appeal, which motion was considered and denied by the trial court, no timely appeal was taken from that order, and the petitioner failed to demonstrate the existence of any of the enumerated exceptions. *Maston v. State*, 750 So. 2d 1234 (Miss. 1999).

The defendant was procedurally barred on his successive petition for post conviction relief under subsection (6) of this section where it appeared that he raised the same arguments on appeal as those raised in his prior petition for post conviction relief. *Retherford v. State*, 749 So. 2d 269 (Miss. Ct. App. 1999).

The exceptions under subsection (6) of this section only allow the filing of a successive writ if the argument presented within the writ falls under one of the exceptions and has not been previously argued and a decision rendered on the merits by the trial court. *Retherford v. State*, 749 So. 2d 269 (Miss. Ct. App. 1999).

A trial court correctly denied, as a successive writ, a defendant's second motion for postconviction relief, even though the second pleading was denominated as a "Petition for Habeas Corpus Post-Conviction Relief," since the Post-Conviction Collateral Relief Act effectively supplanted the prior statutory and rule versions of the writ of habeas corpus so that the defendant's habeas petition would be treated as a petition for postconviction relief filed pursuant to the Post-Conviction Relief Act. *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).

#### **8. Ineffective assistance of counsel.**

Inmate was not able to establish that his plea was involuntary as the inmate admitted the charges before him, and the inmate did not establish that his attorney was ineffective. *Majors v. State*, 946 So. 2d 369 (Miss. Ct. App. 2006).



Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing where there was evidence that the victim's girlfriend poured boiling water on him, along with defendant's testimony that someone else committed this act, which was enough to raise a reasonable doubt that defendant committed the offense; this evidence may have changed the outcome had the parties gone forward. *Hannah v. State*, 943 So. 2d 20 (Miss. 2006).

Denial of inmate's petition for postconviction relief was proper where, by pleading guilty, he waived his right to appeal based upon the indictment. Further, he failed to show that his attorney's advice and performance met the Strickland test; the advice was not erroneous and the inmate failed to show any prejudice resulting from such advice. *Bilbo v. State*, 881 So. 2d 966 (Miss. Ct. App. 2004).

Record demonstrated that trial counsel's performance was not deficient where trial counsel acted according to defendant's instructions and his efforts to investigate potential mitigation evidence were thwarted by uncooperative witnesses; defendant also failed to prove there was a reasonable probability that the outcome would have been different. *Burns v. State*, 879 So. 2d 1000 (Miss. 2004).

To demonstrate that he was entitled to out-of-time appeal, defendant was required to show by preponderance of the evidence that he asked his attorney to file appeal within time limit for doing so and that through no fault of defendant's, his attorney failed to file appeal. *Osborn v. State*, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Counsel was not ineffective in failing to present, during sentencing phase of capital murder prosecution, expert evidence regarding defendant's mental illness, given other evidence of defendant's mental illness, fact that mental illness was not the sole mitigating circumstance presented, and fact that attorney's failure to call expert witnesses did not result from ignorance of the law. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Counsel was not ineffective in failing to conduct more extensive voir dire, where

any further questions would have been redundant in light of questions already asked by court and by prosecutor. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

Counsel was not ineffective in failing to request lesser-included offense instruction which was not warranted by the evidence. *Conner v. State*, 684 So. 2d 608 (Miss. 1996).

A postconviction relief petitioner, who is seeking to overturn a conviction or sentence on the grounds of ineffective assistance of counsel, must demonstrate factual proof by a preponderance of the evidence of an identifiable lapse by counsel and of some actual adverse impact on the fairness of the trial resulting from that lapse. *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

### 9. Habeas corpus.

A petitioner's petition for a writ of habeas corpus would be treated as a motion under § 99-39-5(1)(g), which authorizes a postconviction motion in the nature of collateral review by the petitioner, since she was in custody under a Mississippi conviction and claimed that she was "unlawfully held in custody." Although the petitioner was convicted in 1981, and the conviction was affirmed on direct appeal in 1983, the substantive portions of the Post-Conviction Relief Act, which became effective April 17, 1984, were applicable to the petition. Furthermore, the waiver and procedural bar provisions of the Act were applicable even though the petitioner was tried and convicted prior to the effective date of the Act. *State v. Read*, 544 So. 2d 810 (Miss. 1989).

### 10. Relief denied.

Trial court properly dismissed petitioner's post-conviction motion without an evidentiary hearing where petitioner failed to satisfy the requirements of Miss. Code Ann. § 99-39-23(7) by proving by a preponderance of the evidence that her guilty plea to sexual battery was involuntary; petitioner stated to the trial court that she was pleading guilty "because she was an accomplice." *Staggs v. State*, — So. 2d —, 2007 Miss. App. LEXIS 9 (Miss. Ct. App. Jan. 9, 2007).

Order summarily dismissing petitioner's motion for post-conviction relief was



upheld where his appeal from his motion before the trial court was procedurally barred as a second and subsequent filing under Miss. Code Ann. § 99-39-23(6). *Stewart v. State*, 938 So. 2d 344 (Miss. Ct. App. 2006).

Denial of the inmate's second motion for post-conviction relief was appropriate pursuant to Miss. Code Ann. § 99-39-23(6) since he was required to bring all of his known claims in his first motion for post-conviction relief and he failed to do so. *Freshwater v. State*, 914 So. 2d 328 (Miss. Ct. App. 2005).

Denial of postconviction relief was affirmed because the inmate's claims were contradicted by the record of the plea hearing; when the trial court took great care to ascertain that the inmate had the ability to understand the proceedings, to ascertain that the inmate knew the possible sentence ranges, to ascertain that the inmate knew and understood the rights that he would give up by pleading guilty, to ascertain that he had received adequate counsel, and to ascertain that there was a factual basis for each plea. *Bell v. State*, 909 So. 2d 103 (Miss. Ct. App. 2005).

### RESEARCH REFERENCES

**ALR.** Adequacy of defense counsel's representation of criminal client regarding post-plea remedies. 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 A.L.R.4th 582.

Availability of discovery at probation revocation hearings. 52 A.L.R.5th 559.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Lawyers' Edition.** Accused's right, under Federal Constitution's Sixth Amendment, to compulsory process for obtaining witnesses in accused's favor—Supreme Court cases. 98 L. Ed. 2d 1074.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 99-39-25. Right to appeal; stay of judgment; bail on appeal.

(1) A final judgment entered under this article may be reviewed by the supreme court of Mississippi on appeal brought either by the prisoner or the state on such terms and conditions as are provided for in criminal cases.

(2) A perfection of appeal by the state shall act as a supersedeas and shall stay the judgment until there is a final adjudication by the supreme court.

(3) When the appeal is brought by the state, the prisoner may be released on bail pending appeal under the terms and conditions provided for in Rule 7.02, Mississippi Uniform Criminal Rules of Circuit Court Practice.

(4) When the appeal is brought by the prisoner, bail shall not be allowed.

(5) The attorney general shall represent the state in all appeals under this article, whether the appeal is brought by the prisoner or by the state.

**SOURCES:** Laws, 1984, ch. 378, § 13, eff from and after passage (approved April 17, 1984).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to "this chapter" was changed to "this article." The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Cross References** — Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

**1. In general.**

Even though an appeal from the denial of post-conviction relief was not timely filed, an appellate court was permitted to consider the merits to prevent manifest injustice under Miss. R. App. P. 4(g), Miss. R. App. P. 2(c), and Miss. Code Ann. § 99-39-25(1). *Heafner v. State*, 947 So. 2d 354 (Miss. Ct. App. 2007).

Inmate was not entitled to bail, pursuant to Miss. Code Ann. § 99-35-115, during the appeal of the denial of the inmate's petition for post-conviction relief, as, under Miss. Code Ann. § 99-39-25(4), bail was not permitted for such prisoners. *Atwell v. State*, 848 So. 2d 190 (Miss. Ct. App. 2003).

Appellate court dismissed defendant's appeal of alleged denial of defendant's petition for post-conviction relief as no final order was ever entered by the trial court and, absent such an order, the appellate court lacked jurisdiction to consider the appeal. *Scott v. State*, 817 So. 2d 642 (Miss. Ct. App. 2002).

On appeal following remand for evidentiary hearing in postconviction relief proceeding on petitioner's claim that he was denied right to testify in his own behalf, issue of whether especially heinous, atrocious or cruel aggravating circumstance instruction required reversal of death sentence and new sentencing hearing was not properly before court and would not be discussed. *Neal v. State*, 687 So. 2d 1180 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Question of defendant's actual guilt of conspiracy could not be litigated on appeal from denial of postconviction relief after defendant pled guilty to conspiracy. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on § 99-19-57(2)(b) and *Ford v. Wainwright* (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded

due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

The rule that the death of a defendant who has perfected his or her right to appeal does not render the appeal moot applies to petitions for rehearing or when a defendant dies pending appeal from a denial of post-conviction relief; however, if a defendant dies pending application to the Supreme Court for leave to proceed in trial court on post-conviction relief grounds, the application will be deemed moot and the conviction will remain intact. *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

A petitioner was not entitled to proceed with an out-of-time appeal, even though he alleged that he had never received a copy of the order from which he sought to appeal and that this prevented him from timely appealing through no fault of his own, where his original postconviction petition to the circuit court to set aside his guilty plea was time barred. When one seeks an out-of-time appeal from a ruling of a trial court on a petition that was already time barred by law at the time it was filed, an out-of-time appeal would accomplish nothing. *Freelon v. State*, 569 So. 2d 1168 (Miss. 1990).

Under § 99-39-7 and this section, there are only 2 instances in which the Supreme Court can entertain a post-conviction motion. One is where the matter is presented originally to the trial court and thereafter appealed to the Supreme Court pursuant to this section. The other is where the prisoner is required to first seek leave of the Supreme Court to proceed in the lower court. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

A defendant's post-conviction relief action for a stay of execution of a lower court judgment revoking probation, which was filed in the Supreme Court of Mississippi, would be dismissed without prejudice as having been filed in the wrong court, even though the defendant's previous direct ap-



peal to the Supreme Court seeking review of the probation revocation was dismissed "without prejudice for [the defendant] to institute a post-conviction relief action under § 99-39-5(1)(g)," and thus the Supreme Court was arguably the last court to exercise jurisdiction and should therefore be the court of first resort for the post-conviction petition. For the Supreme Court to acquire exclusive, original jurisdiction over a petition filed under the Post-Conviction Relief Act, the Supreme Court must have previously made some final determination going to the merits of the underlying conviction and sentence; it is not enough that the Supreme Court dismissed an appeal without prejudice for lack of jurisdiction, and that the Supreme Court granted a temporary stay of execution incident to attempted post-conviction proceedings. In order to obtain Supreme Court review, the defendant would be required to file an appropriate petition in the lower court, claiming under § 99-39-5(1)(g) that his probation has been unlawfully revoked, and if dissatisfied with the ruling of that court he could appeal that ruling to the Supreme Court pursuant to § 99-39-25. *Martin v. State*, 556 So. 2d 357 (Miss. 1990).

A prisoner who has filed a proper motion pursuant to the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et

seq.) may be entitled to trial transcripts or other relevant documents under the discovery provisions of § 99-39-15, upon good cause shown and in the discretion of the trial judge. If the prisoner's request for transcripts or other documents is denied, and his or her overall petition is ultimately denied, then the prisoner may appeal the denial of the petition for collateral relief pursuant to this section and, within that appeal, the prisoner may include the claim that the denial of his or her request for transcripts or other documents was error. However, nothing in the Uniform Post-Conviction Collateral Relief Act or elsewhere gives the prisoner the right to institute an independent, original action for a free transcript or other documents, and then if dissatisfied with the trial court's ruling, to directly appeal that ruling to the Supreme Court as a separate and independent action. *Fleming v. State*, 553 So. 2d 505 (Miss. 1989), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

The death of a defendant who has perfected his or her right to appeal does not render the appeal moot and leave his or her conviction permanently in place. (*Overruling Berryhill v. State* (Miss. 1986) 492 So. 2d 288 and *Haines v. State* (Miss. 1983) 428 So. 2d 590.) *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-27. Application to Supreme Court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.

(1) The application for leave to proceed in the trial court filed with the Supreme Court under Section 99-39-7 shall name the State of Mississippi as the respondent.

(2) The application shall contain the original and two (2) executed copies of the motion proposed to be filed in the trial court together with such other supporting pleadings and documentation as the Supreme Court by rule may require.



(3) The prisoner shall serve an executed copy of the application upon the Attorney General simultaneously with the filing of the application with the court.

(4) The original motion, together with all files, records, transcripts and correspondence relating to the judgment under attack, shall promptly be examined by the court.

(5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.

(6) The court upon satisfaction of the standards set forth in this article is empowered to grant the application.

(7) In granting the application the court, in its discretion, may:

(a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted therewith, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.

(b) Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.

(8) No application or relief shall be granted without the Attorney General being given at least five (5) days to respond.

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed pursuant to Section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence of death. A dismissal or denial of an application relating to insanity under Section 99-19-57(2), Mississippi Code of 1972, shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(10) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(11) Post-conviction proceedings wherein the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section.

**SOURCES:** Laws, 1984, ch. 378, § 14; Laws, 1995, ch. 566, § 6; Laws, 2000, ch. 569, § 14, eff from and after July 1, 2000.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference in this section. The reference to “this chapter” was changed to “this article.” The Joint Committee ratified the correction at its September 18, 2000 meeting.

**Editor’s Note** — Laws of 2000, ch. 569, § 1, provides:

“SECTION 1. Sections 1 through 18 of this act may be cited as the ‘Mississippi Capital Post-Conviction Counsel Act.’”

Sections 1 through 10 of Laws, 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Filing motion for collateral relief, see § 99-39-7.

Need for judicial examination of motion for collateral relief and motion to proceed, see § 99-39-11.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Dismissal or denial of application.
3. Successive petitions.

### 1. In general.

Although an appellate court could not affirm a denial of an inmate’s petition for post-conviction relief on the grounds that it was procedurally barred by Miss. Code Ann. § 99-39-27, the appellate court affirmed the denial on other grounds. *Steen v. State*, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Court rejected the State’s argument that the inmate failed to comply with the requirements of Miss. Code Ann. § 99-39-11(3); (1) first, the court found no requirement of verification in the statute, and (2) while verification of the motion to vacate death sentence was required by Miss. Code Ann. § 99-39-9(3), and absent substantial compliance with Miss. Code Ann. § 99-39-9(4), a prisoner faced possible dismissal of an application, the court found nothing to be gained in this instance in returning the inmate’s motion and application filed under Miss. Code Ann. § 99-39-27 for verification. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

Because a new decision was an intervening decision, even though an inmate’s application for post-conviction relief was time-barred under Miss. Code Ann. § 99-39-5(2), the application was not barred

under Miss. Code Ann. § 99-39-27(9) and was eligible to be considered on the merits. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

Although the court was not without the authority to decide the merits of an inmate’s application pursuant to Miss. Code Ann. § 99-39-27(7), the court found that due process required the court to allow the inmate’s motion to be filed in the trial court for the consideration of mental retardation evidence as a defense to the death penalty as cruel and unusual punishment under U.S. Const. Amend. VIII. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004).

The circuit court had jurisdiction to entertain a postconviction motion and to grant an evidentiary hearing since the statute makes clear that when the Supreme Court allows the filing of a motion with the trial court, further proceedings shall occur under the several, enumerated sections of the Post Conviction Collateral Relief Act. *Payton v. State*, 708 So. 2d 559 (Miss. 1998).

State statute providing that state supreme court was to deny application to proceed on motion for post-conviction relief, unless it appeared from face of application, motion, exhibits, exhibits and prior record that post-conviction claims were not procedurally barred under separate statute and that they further pre-



sented substantial showing of denial of state or federal right, could not operate as procedural bar to federal habeas review, because it required some evaluation of merits of applicant's claims and was not separate from merits of habeas claim. *Stokes v. Anderson*, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Trial court was not authorized to summarily deny motion to vacate conviction and sentence after Supreme Court granted movant's application for leave to file motion for post-conviction relief. *Hymes v. State*, 703 So. 2d 258 (Miss. 1997).

Statement by Mississippi Supreme Court that inmate's habeas claims were barred by state Uniform Post-Conviction Collateral Relief Act and failed to present substantial showing of denial of state or federal right was plain statement that state's review of claim was procedurally barred, as required for district court to deny federal habeas review based on state procedural ground. *Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996).

A post-conviction relief petitioner who claimed he was not competent to be executed bore the burden of showing by a preponderance of the evidence that, at the time of the hearing, he was not competent; even after he made the threshold showing that entitled him to proceed in trial court under this section, he faced a presumption that he was sane and competent to be executed. *Billiot v. State*, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

The rule that the death of a defendant who has perfected his or her right to appeal does not render the appeal moot applies to petitions for rehearing or when a defendant dies pending appeal from a denial of postconviction relief; however, if a defendant dies pending application to the Supreme Court for leave to proceed in trial court on postconviction relief grounds, the application will be deemed moot and the conviction will remain intact. *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alter-

native motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of subsection (9) of this section. *Smith v. State*, 648 So. 2d 63 (Miss. 1994).

Question of whether admission at trial of tape recorded statements taken from defendant outside presence of counsel violated Sixth Amendment rights was res judicata and barred from relitigation because defendant's conviction of murder became final when Fifth Circuit upheld his conviction and he did not petition United States Supreme Court to review that decision. *Jordan v. State*, 518 So. 2d 1186 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).

Intervening decision alone does not preclude waiver under § 99-39-21, but can only except case from effect of 3-year statute of limitations in § 99-39-5(2) and prohibition of second petitions in § 99-39-27(9). *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

## 2. Dismissal or denial of application.

Petitioner's motion for post-conviction relief was properly denied where one of his rape convictions and sentence had been appealed to the Mississippi Supreme Court, which upheld the conviction and sentence; petitioner should have filed an application for leave to proceed in the trial court prior to filing for relief. *Stewart v. State*, 938 So. 2d 344 (Miss. Ct. App. 2006).

Petitioner for post-conviction relief is required to make a substantial showing of the denial of a state or federal right. Petitioner's bald assertion of innocence fails to make such a showing. The issue is without merit. *Hughes v. State*, 892 So. 2d



203 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 2935, 162 L. Ed. 2d 870 (2005).

Defendant cited no intervening cases or newly discovered evidence that would have excepted his claim from the procedural bar on successive post-conviction relief motions; therefore, his second motion was an impermissible successive attempt at post-conviction relief, in violation of Miss. Code Ann. § 99-39-27(9). *Clark v. State*, 898 So. 2d 687 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

There was no intervening decision that would warrant a reversal of a petitioner's sentence of death because the decision was distinguishable from the reasoning in the petitioner's direct appeal regarding the admissibility of evidence of a sheriff's subsequent extortion conviction. *Wilcher v. State*, 863 So. 2d 719 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

Inmate's application for post-conviction relief was denied as the claims were without merit, barred by the doctrine of res judicata, procedurally barred as a successive writ under Miss. Code Ann. § 99-39-27(9), and time-barred pursuant to Miss. Code Ann. § 99-39-5(2); the inmate had already raised the argument of the "intervening decision," had not presented any new evidence that was not reasonably discoverable at trial or that would have caused a different result if introduced, nor had the inmate provided evidence of any violation of any fundamental rights, the inmate failed to demonstrate that the claims were not procedurally barred pursuant to Miss. Code Ann. § 99-39-21(6), and failed to prove ineffective assistance of counsel. *Wiley v. State*, 842 So. 2d 1280 (Miss. 2003).

The defendant's claim that he was denied his right to testify at trial related to the guilt phase of the trial and was procedurally barred under subsection (9). *Williams v. State*, 722 So. 2d 447 (Miss. 1998).

### 3. Successive petitions.

Defendant's second motion for post-conviction relief was properly denied as a prohibited successive writ because defendant's claimed newly discovered evidence under Miss. Code Ann. § 99-39-27(9) was easily discoverable at the time of trial; the

evidence consisted of affidavits from the circuit court which certified that the circuit court had no records of the grand jury proceedings in which defendant was indicted, the affidavit of the grand jury foreman, or the minutes of the grand jury. *Barnes v. State*, — So. 2d —, 2007 Miss. App. LEXIS 282 (Miss. Ct. App. May 1, 2007).

Appellate court affirmed the denial of an inmate's petition for post-conviction relief; it was barred as a successive petition pursuant to Miss. Code Ann. § 99-39-27(9), and there were no fundamental constitutional rights that would operate as an exception to the procedural bar. *Berry v. State*, 924 So. 2d 624 (Miss. Ct. App. 2006).

Motion for post-conviction relief filed more than seven years after the entry of a guilty plea to drug charges was properly denied as being time barred under Miss. Code Ann. § 99-39-5(2); moreover, it was also a successive petition under Miss. Code Ann. § 99-39-27(9) where relief had been denied once before, despite the style of the motion. *King v. State*, 943 So. 2d 743 (Miss. Ct. App. 2006).

Defendant's reliance on a prior opinion was without merit as the opinion which replaced it did not contain the language upon which defendant relied; the successive petition bar in Miss. Code Ann. § 99-39-27(9) prevented defendant from raising this motion for post-conviction relief and the intervening decision exception did not apply. *Simmons v. State*, 942 So. 2d 802 (Miss. 2006).

Defendant's current petition for "writ of habeas corpus" was procedurally barred because it was actually a second motion for post-conviction relief, which was prohibited under Miss. Code Ann. § 99-39-27(9) as a successive writ; defendant's remaining claims were barred as a successive writ. *Vance v. State*, 941 So. 2d 225 (Miss. Ct. App. 2006).

Defendant's petition for post-conviction relief was clearly a successive writ, Miss. Code Ann. § 99-39-27(9), and was time-barred under Miss. Code Ann. § 99-39-5(2). *Roland v. State*, 939 So. 2d 810 (Miss. Ct. App. 2006).

Appellant who pled guilty to armed robbery and aggravated assault was proce-

durally barred from bringing a second motion for post-conviction relief; appellant's claim that the guilty plea was involuntary and that he received the ineffective assistance of counsel did not prove a violation of his fundamental rights that would qualify as an exception to the procedural bar. *Ellis v. State*, 952 So. 2d 251 (Miss. Ct. App. 2006).

Having previously filed a motion for post-conviction relief which was dismissed by the trial court, defendant may not file a second or successive motion under Miss. Code Ann. § 99-39-27(9) absent some exception to the procedural bar. *Smith v. State*, 922 So. 2d 43 (Miss. Ct. App. 2006).

Both defendant's application for leave to file a motion for post-conviction relief, attacking his rape conviction and sentence in 2001 (denied by the Mississippi Supreme Court), and his motion for post-conviction relief in 2002 (which raised the issue of his parole eligibility), attacked the same conviction and sentence. Thus, his subsequent motion for post-conviction relief was barred as a successive writ under Miss. Code Ann. § 99-39-27(9); in addition, in its order denying his prior application, the Mississippi Supreme court had stated that defendant's sentence was to be interpreted in accordance with the governing laws at the time his crime was committed, and again, his later motion for post-conviction relief attacked the same sentence and was a successive writ. *Bynum v. State*, 916 So. 2d 534 (Miss. Ct. App. 2005).

Petitioner's notice of appeal in writ of state habeas corpus was properly denied as a successive writ pursuant to Miss. Code Ann. § 99-39-27(9) because petitioner had previously filed an application for post-conviction relief, which was denied. The notice of appeal in writ of state habeas corpus was also time barred under Miss. Code Ann. § 99-39-5(2). *Austin v. State*, 914 So. 2d 1281 (Miss. Ct. App. 2005).

Appellate court affirmed the dismissal of the inmate's motion for post-conviction relief as it was also barred as a successive writ under Miss. Code Ann. § 99-39-27(6) as it was the second motion filed. *Hill v. State*, 914 So. 2d 293 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief on the basis that his probation was unlawfully revoked was proper where the trial court had found that he had previously presented his argument. The appellate court was unwilling to allow the inmate numerous attempts at presenting the same issues. *Robinson v. State*, 904 So. 2d 203 (Miss. Ct. App. 2005).

Inmate's third motion for post-conviction relief was properly dismissed as an impermissible successive attempt to obtain post-conviction relief. The inmate cited to no intervening cases or newly discovered evidence, not reasonably discoverable at the time of trial, which would except his claim from the successive writ bar. *Brown v. State*, 907 So. 2d 979 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Defendant's motion for post-conviction relief failed as it was procedurally barred in accordance with Miss. Code Ann. § 99-39-27(9); defendant filed his first motion for post-conviction relief on April 12, 1994; the circuit court denied relief and the supreme court affirmed on June 5, 1997; as such, his most recent motion, filed August 22, 2003, was barred as a successive writ. *Cook v. State*, 910 So. 2d 745 (Miss. Ct. App. 2005).

Defendant's appeal was a successive petition for an out-of-time appeal, thus he was procedurally barred from prosecuting his appeal under Miss. Code Ann. § 99-39-27 because his previous application for relief was acted upon by the court and denied. Also the trial court had properly denied defendant's prior three motions for post-conviction relief from his murder conviction where defendant failed to assert his motions within the three-year statutory time period provided under Miss. Code Ann. § 99-39-5(2) or to establish that his claims fell within one of its three recognized exceptions. *Bass v. State*, 888 So. 2d 1187 (Miss. Ct. App. 2004).

Inmate's second petition for post-conviction relief was properly denied as the inmate did not cite any intervening cases or newly discovered evidence that would except his claim from the procedural bar in Miss. Code Ann. § 99-39-27(9). *Bell v. State*, 886 So. 2d 739 (Miss. Ct. App.



2004), cert. denied, 887 So. 2d 183 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1647, 161 L. Ed. 2d 485 (2005).

*Atkins v. Virginia*, declaring the execution of the mentally retarded to be unconstitutional, was an “intervening decision” under Miss. Code Ann. § 99-39-27(9), such that the procedural bars raised by the State, that of timeliness and successive application, were inapplicable. *Foster v. State*, 848 So. 2d 172 (Miss. 2003).

There is a distinction between newly discovered evidence, which may not be subjected to the procedural bar, and newly disclosed evidence that was known to the movant from the inception of the proceeding but, for reasons not apparent on the record, was not disclosed at the time of sentencing. *Williams v. State*, 802 So. 2d 1058 (Miss. Ct. App. 2001).

The defendant’s motion for post-conviction relief was a second attempt at gaining post-conviction relief not falling within any of the statutory exceptions to the provision barring subsequent filings after one motion is acted upon by the court. *Jackson v. State*, 811 So. 2d 340 (Miss. Ct. App. 2001).

The petitioner’s second petition for post-conviction relief was barred where he did not pursue an appeal after the denial of his first petition, and he presented the same arguments in his second petition. *Buice v. State*, 751 So. 2d 1171 (Miss. Ct. App. 1999).

The defendant’s motion for post conviction relief was barred by the successive writ bar of subsection (9) of this section, where (1) the defendant appealed his conviction and sentence, and the Court of Appeals affirmed the judgment, (2) he then filed in the Supreme Court an application for leave to proceed in the trial court with a motion for post conviction relief, and such application was denied, and (3) he then filed a post conviction motion in the circuit court. *Lawson v. State*, 748 So. 2d 96 (Miss. 1999).

The defendant’s petition for post-conviction relief would be denied as an improper successive petition, notwithstanding his contention that his former appointed attorney tricked him into voluntarily dismissing his first appeal knowing that any new petitions would be dismissed as successive writs. *Lyle v. State*, 756 So. 2d 1 (Miss. Ct. App. 1999).

A second petition for relief, which only sought records, was not barred by subsection (9) since: (1) no final order on the earlier motion had yet been entered, and (2) it did not seek relief from a conviction or sentence. *Berryman v. State*, 734 So. 2d 292 (Miss. Ct. App. 1999).

A post-conviction motion was barred where the movant had brought a previous similar motion, which had been denied, and no timely appeal was taken. Appeal out-of-time was denied. *Sneed v. State*, 722 So. 2d 1255 (Miss. 1998).

## RESEARCH REFERENCES

**ALR.** Availability of discovery at probation revocation hearings. 52 A.L.R.5th 559.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Post conviction relief. 57 Miss. L. J. 524, August, 1987.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 99-39-28. Supreme Court to establish rules for post-conviction proceedings in capital cases.

If application to proceed in the trial court is granted, post-conviction proceedings on cases where the death penalty has been imposed in the trial court and appeals from the trial court shall be conducted in accordance with rules established by the Supreme Court.



**SOURCES:** Laws, 2000, ch. 569, § 16, eff from and after July 1, 2000.

**Editor's Note** — Laws of 2000, ch. 569, § 1, provides:

“SECTION 1. Sections 1 through 18 of this act may be cited as the ‘Mississippi Capital Post-Conviction Counsel Act.’”

Sections 1 through 10 of Laws, 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## § 99-39-29. Stay of death penalty execution.

If the prisoner or prisoners shall be under sentence of death and the date fixed for the execution of the sentence shall arrive at a time when proceedings for post-conviction collateral relief are pending, either in the state or the federal courts, the Supreme Court of Mississippi shall have the authority to stay the execution upon a substantial showing of merit pending the determination of said proceeding. If, however, a stay has been entered either by a state or federal court and post-conviction collateral relief is denied, the Supreme Court of Mississippi shall forthwith fix a day, not more than thirty (30) days distant from the date of said denial or the vacating of any stay entered by any federal court, for the execution of the sentence, and a warrant shall forthwith issue accordingly.

**SOURCES:** Laws, 1984, ch. 378, § 15; Laws, 1985, ch. 305, § 2, eff from and after passage (approved February 28, 1985).

**Cross References** — Review by the Supreme Court of imposition of death penalty generally, see § 99-19-105.

Date of execution of death sentence, see § 99-19-106.

Applications for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. Ford claims.

Since Miss. Code Ann. § 99-39-29 required that the Mississippi Supreme Court schedule an inmate's execution within 30 days if the federal habeas court rejected the inmate's Ford claim and the inmate's execution date had been stayed since he filed his federal habeas corpus petition, the State's assertion that the

inmate's Ford claim was premature because no execution date was scheduled was rejected by the federal habeas court. *Billiot v. Epps*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 28011 (S.D. Miss. Oct. 28, 2005).

**Cited in:** *Dearman v. State*, 910 So. 2d 708 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.

**CJS.** 24 C.J.S., Criminal Law §§ 2220-

2229, 2238-2266, 2272-2288, 2432, 2433, 2454, 2459.

**Law Reviews.** Habeas corpus: The

"Great Writ" in Mississippi state courts.  
58 Miss. L. J. 25, Spring, 1988.  
Smith, The insanity plea in Mississippi:

a primer and a proposal. 10 Miss. C. L.  
Rev. 147, Spring, 1990.

## ARTICLE 3.

## MISSISSIPPI CAPITAL POST-CONVICTION COUNSEL ACT.

## SEC.

- 99-39-101. Short title.
- 99-39-103. Office of Post-Conviction Counsel created; personnel; appointment to office; qualifications; removal.
- 99-39-105. Purpose of office.
- 99-39-107. Duties of office; attorneys appointed to office to be full time.
- 99-39-109. Compensation.
- 99-39-111. Office hours of operation.
- 99-39-113. Powers and duties of director; requirement of surety bond.
- 99-39-115. Director to keep a docket of all death penalty cases in Mississippi.
- 99-39-117. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Post-Conviction Counsel Fund.
- 99-39-119. Director authorized to solicit funds for purpose of funding and operating office.

## § 99-39-101. Short title.

This article may be cited as the "Mississippi Capital Post-Conviction Counsel Act."

**SOURCES:** Laws, 2000, ch. 569, § 1, eff from and after July 1, 2000.

**Editor's Note** — Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.'"

Sections 1 through 10 of Laws, 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

## JUDICIAL DECISIONS

## 1. In general.

State was not entitled to avail itself of the opt-in structure provided in the Anti-terrorism and Effective Death Penalty Act of 1996, 28 U.S.C.S. § 2261, thus reducing the one-year limitation period to 180 days for a death row inmate, because it offered no evidence that it had complied

with the opt-in structure statutory requirements; mere passage of the Mississippi Capital Post-Conviction Counsel Act, Miss. Code Ann. § 99-39-101 et seq., and promulgation of subsections (d) and (e) to Miss. R. App. P. 22 was not sufficient. *Grayson v. Epps*, 338 F. Supp. 2d 699 (S.D. Miss. 2004).

**§ 99-39-103. Office of Post-Conviction Counsel created; personnel; appointment to office; qualifications; removal.**

There is created the Mississippi Office of Capital Post-Conviction Counsel. This office shall consist of three (3) attorneys, one (1) investigator, one (1) fiscal officer and one (1) secretary/paralegal. One of the attorneys shall serve as director of the office. The director shall be appointed by the Chief Justice of the Supreme Court with the approval of a majority of the justices voting, for a term of four (4) years, or until a successor takes office. The remaining attorneys and other staff shall be appointed by the director of the office and shall serve at the will and pleasure of the director. The director and all other attorneys in the office shall either be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. At least three (3) of the attorneys in the office shall meet all qualifications necessary to serve as post-conviction counsel for persons under a sentence of death. The director may be removed from office by the Chief Justice upon finding that the director is not qualified under law to serve as post-conviction counsel for persons under sentences of death, has failed to perform the duties of the office or has acted beyond the scope of the authority granted by law for the office.

**SOURCES:** Laws, 2000, ch. 569, § 2; Laws, 2001, ch. 526, § 2, eff from and after July 1, 2001.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

**§ 99-39-105. Purpose of office.**

The Office of Capital Post-Conviction Counsel is created for the purpose of providing representation to indigent parties under sentences of death in post-conviction proceedings, and to perform such other duties as set forth by law.

**SOURCES:** Laws, 2000, ch. 569, § 3, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.



**§ 99-39-107. Duties of office; attorneys appointed to office to be full time.**

The Office of Capital Post-Conviction Counsel shall limit its activities to the representation of inmates under sentence of death in post-conviction proceedings and ancillary matters related directly to post-conviction review of their convictions and sentences and other activities explicitly authorized in statute. Representation by the office or by private counsel under appointment by the office will end upon the filing of proceeding for federal habeas corpus review or for appointment of counsel to represent the defendant in federal habeas corpus proceedings. However, the office may continue representation if the office or a staff attorney employed by the office shall be appointed by a federal court to represent the inmate in federal habeas corpus proceedings. In such event, the office or the employee attorney shall apply to the federal court for compensation and expenses and shall upon receipt of payments by the federal court pay all sums received over to the office for deposit in the Special Capital Post-Conviction Counsel Fund as provided in Section 99-39-117, from which all expenses for investigation and litigation shall be disbursed. Representation in post-conviction proceedings shall further include representation of the inmate from the exhaustion of all state and federal post-conviction litigation until execution of the sentence or an adjudication resulting in either a new trial or a vacation of the death sentence. The attorneys appointed to serve in the Office of Capital Post-Conviction Counsel shall devote their entire time to the duties of the office, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, participate in the trial of any person charged with capital murder or direct appeal of any person under sentence of death in the state, nor engage in lobbying activities for or against the death penalty. Any violation of this provision shall be grounds for termination from employment, in the case of the director, by the Chief Justice, and in the case of other attorneys, by the director, with approval of the Chief Justice.

**SOURCES:** Laws, 2000, ch. 569, § 4, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

Special Capital Post-Conviction Counsel Fund, see § 99-39-117.

**§ 99-39-109. Compensation.**

The director appointed under this article shall be compensated at no more than the maximum amount allowed by statute for a district attorney, and other

attorneys in the office shall be compensated at no more than the maximum amount allowed by statute for an assistant district attorney.

**SOURCES:** Laws, 2000, ch. 569, § 5, eff from and after July 1, 2000.

**Cross References** — Salaries of district attorneys and assistant district attorneys, see § 25-3-35.

District attorneys generally, see §§ 25-31-1 et seq.

Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

### § 99-39-111. Office hours of operation.

The Director of the Office of Post-Conviction Counsel shall keep the office open Monday through Friday for not less than eight (8) hours each day.

**SOURCES:** Laws, 2000, ch. 569, § 6, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

### § 99-39-113. Powers and duties of director; requirement of surety bond.

In addition to the authority to represent persons under sentence of death in state post-conviction proceedings, the director is hereby empowered to pay and disburse salaries, employment benefits and charges relating to employment of staff and to establish their salaries, and expenses of the office; to incur and pay travel expenses of staff necessary for the performance of the duties of the office; to rent or lease on such terms as he may think proper such office space as is necessary in the City of Jackson to accommodate the staff; to solicit and accept monies, gifts, grants or services from any public or private sources for the purpose of funding, operating and executing the statutory duties of the office; to enter into and perform contracts, including but not limited to, contracts and agreements necessary to obtain and receive monies, gifts, grants or services from federal, public and private sources, and to purchase such necessary office supplies and equipment as may be needed for the proper administration of said offices; and to incur and pay such other expenses as are appropriate and customary to the operations of the office. The director shall be required to obtain a surety bond in the amount of not less than One Hundred Thousand Dollars (\$100,000.00) payable to the state. The cost of such bond shall be paid out of funds appropriated for the operations of the office. All

salaries and other expenditures shall be paid from funds appropriated for such purposes augmented by funds received as gifts and grants from public and private sources.

**SOURCES:** Laws, 2000, ch. 569, § 7, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.  
 Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.  
 Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.  
 Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.  
 Appointment of post-conviction counsel in capital cases, see § 99-39-23.

**§ 99-39-115. Director to keep a docket of all death penalty cases in Mississippi.**

The director shall, as prescribed by the Chief Justice, keep a docket of all death penalty cases originating in the courts of Mississippi, which must at all reasonable times be open to the inspection of the public and must show the county, district and court in which the causes have been instituted. The director shall prepare and maintain a roster of all death penalty cases originating in the courts of Mississippi and pending in state and federal courts indicating the current status of each such case, and a history of those death penalty cases filed since 1976. Copies of such dockets and rosters shall be submitted to the Supreme Court in such format and with such appropriate information and as frequently as the Chief Justice may direct. The director shall also report monthly to the Chief Justice the activities, receipts and expenditures of the office.

**SOURCES:** Laws, 2000, ch. 569, § 8, eff from and after July 1, 2000.

**Cross References** — Circuit court clerk to maintain docket of cases, see § 9-7-175.  
 Public defenders, generally, see §§ 25-32-1 et seq.  
 Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.  
 Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.  
 Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.  
 Appointment of post-conviction counsel in capital cases, see § 99-39-23.

**§ 99-39-117. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Post-Conviction Counsel Fund.**

(1) If at any time during the representation of two (2) or more defendants, the director determines that the interest of those persons are so adverse or hostile that they cannot all be represented by the director or his staff without conflict of interest, or if the director shall determine that the volume or number of representations shall so require, the director, in his sole discretion, not withstanding any statute or regulation to the contrary, shall be authorized to employ qualified private counsel. Fees and expenses, approved by order of the



appropriate court, including investigative and expert witness expenses of such private counsel shall be paid from funds appropriated to the Capital Post-Conviction Counsel Fund for this purpose.

(2) There is created in the State Treasury a special fund to be known as the Capital Post-Conviction Counsel Fund. The purpose of the fund shall be to provide funding for the Office of Capital Post-Conviction Counsel. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Mississippi Office of Capital Post-Conviction Counsel. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

- (a) Monies appropriated by the Legislature for the purposes of funding the Office of Capital Post-Conviction Counsel;
- (b) The interest accruing to the fund;
- (c) Monies received under the provisions of Section 99-19-73;
- (d) Monies received from the federal government;
- (e) Donations; and
- (f) Monies received from such other sources as may be provided by law.

**SOURCES:** Laws, 2000, ch. 569, § 9; Laws, 2005, ch. 413, § 3, eff from and after July 1, 2005.

**Amendment Notes** — The 2005 amendment added (2); and in (1), rewrote the last sentence.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

Director authorized to solicit funds for purpose of funding and operating office, see § 99-39-119.

## § 99-39-119. Director authorized to solicit funds for purpose of funding and operating office.

The director is further authorized to solicit and accept monies, gifts, grants or services from any public or private source, for the purpose of funding, operating and executing the duties of the office.

**SOURCES:** Laws, 2000, ch. 569, § 10, eff from and after July 1, 2000.

**Cross References** — Public defenders, generally, see §§ 25-32-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

Capital Post-Conviction Counsel Fund, see § 99-39-117.

## CHAPTER 40

### Office of Indigent Appeals

SEC.

99-40-1. Office of Indigent Appeals created; director and staff; compensation; duties; Indigent Appeals Fund; Division of Public Defender Training created; Public Defenders Education Fund.

#### **§ 99-40-1. Office of Indigent Appeals created; director and staff; compensation; duties; Indigent Appeals Fund; Division of Public Defender Training created; Public Defenders Education Fund.**

(1) There is created the Mississippi Office of Indigent Appeals. This office shall consist of six (6) attorneys, two (2) secretaries/paralegals and one (1) financial assistant. One (1) of the attorneys shall serve as director of the office. The director shall be appointed by the Governor and shall serve for a term of four (4) years. The remaining attorneys and other staff shall be appointed by the director and shall serve at the will and pleasure of the director. The director and all other attorneys in the office shall either be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The attorneys in the office shall practice law exclusively for the office and shall not engage in any other practice. The office shall not engage in any litigation other than that related to the office. The salary for the director shall be equivalent to the salary of district attorneys and the salary of the other attorneys in the office shall be equivalent to the salary of an assistant district attorney.

(2) The office shall provide representation on appeal for indigent persons convicted of felonies but not under sentences of death. Representation shall be provided by staff attorneys, or, in the case of conflict or excessive workload, by attorneys selected, employed and compensated by the office on a contract basis. All fees charged by contract counsel and expenses incurred by attorneys in the office and contract counsel must be approved by the court. At the sole discretion of the director, the office may also represent indigent juveniles adjudicated delinquent on appeals from a county court or chancery court to the Mississippi Supreme Court and/or the Mississippi Court of Appeals. The office shall provide advice, education and support to attorneys representing persons under felony charges in the trial courts.

(3) There is created in the State Treasury a special fund to be known as the Indigent Appeals Fund. The purpose of the fund shall be to provide funding for the Mississippi Office of Indigent Appeals. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Mississippi Office of Indigent Appeals. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature for the purposes of funding the Office of Indigent Appeals;

(b) The interest accruing to the fund;

(c) Monies received under the provisions of Section 99-19-73;

(d) Monies received from the federal government;

(e) Donations; and

(f) Monies received from such other sources as may be provided by law.

(4) There is created in the Office of Indigent Appeals the Division of Public Defender Training. The division shall be staffed by any necessary personnel as determined and hired by the director. The mission of the division shall be to work closely with the Mississippi Public Defenders Association to provide training and services to public defenders practicing in all state, county and municipal courts. These services shall include, but not be limited to, continuing legal education, case updates and legal research. The division shall provide (a) education and training for public defenders practicing in all state, county, municipal and youth courts; (b) technical assistance for public defenders practicing in all state, county, municipal and youth courts; and (c) current and accurate information for the Legislature pertaining to the needs of public defenders practicing in all state, county, municipal and youth courts.

(5) There is created in the State Treasury a special fund to be known as the Public Defenders Education Fund. The purpose of the fund shall be to provide funding for the training of public defenders. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Office of Indigent Appeals. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of:

(a) Monies appropriated by the Legislature for the purposes of public defender training;

(b) The interest accruing to the fund;

(c) Monies received under the provisions of Section 99-19-73;

(d) Monies received from the federal government;

(e) Donations; and

(f) Monies received from such other sources as may be provided by law.

**SOURCES:** Laws, 2005, ch. 413, § 1; Laws, 2006, ch. 560, § 1; Laws, 2007, ch. 559, § 2, eff from and after July 1, 2007.

**Amendment Notes** — The 2006 amendment added the next-to-last sentence in (2). The 2007 amendment added (4) and (5); and made a minor stylistic change.

**Cross References** — Appointment of counsel for indigents, see § 99-15-15.

Public defenders, see §§ 25-32-1 et seq.

Representation provided for indigent defendants in capital cases, see §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Standard state monetary assessment for certain violations, misdemeanors and felonies, see § 99-19-73.



## CHAPTER 41

### Mississippi Crime Victims' Compensation Act

#### SEC.

- 99-41-1. Short title.
- 99-41-3. Legislative intent.
- 99-41-5. Definitions.
- 99-41-7. Division of Victim Compensation; Director of Victim Compensation; duties; appointment.
- 99-41-9. Powers and duties of division.
- 99-41-11. Additional powers and duties of director; conduct of hearing; record.
- 99-41-13. Appeals.
- 99-41-15. Filing of claim as waiver of physician-patient confidentiality; ordering mental or physical examination or autopsy.
- 99-41-17. Compensation awards; conditions; exceptions; reduction.
- 99-41-19. Proof of conviction as evidence; suspension of proceedings pending prosecution.
- 99-41-21. Repayment of compensation; subrogation of state.
- 99-41-23. Calculation of award; payment in installments; assignment of award.
- 99-41-25. Advance award.
- 99-41-27. False claims; penalty.
- 99-41-29. Crime Victims' Compensation Fund.
- 99-41-31. Disclosure of records as to claims; confidentiality of records.

#### § 99-41-1. Short title.

This chapter shall be known and may be cited as the “Mississippi Crime Victims' Compensation Act.”

**SOURCES:** Laws, 1990, ch. 509, § 1, eff from and after July 1, 1991.

**Cross References** — Community service restitution, see §§ 99-20-1 et seq.  
Victim Assistance Coordinator, see §§ 99-36-1 et seq.  
Restitution to victims of crimes, generally, see §§ 99-37-1 et seq.  
Crime Victim's Escrow Account Act, see §§ 99-38-1 et seq.

#### § 99-41-3. Legislative intent.

It is the intent of the Legislature to provide a method of compensating those persons who are innocent victims of criminal acts within the state and who suffer bodily injury or death and of assisting victims of crime through information referrals and advocacy outreach programs. To this end, it is the Legislature's intention to provide compensation for injuries suffered as a direct result of the criminal acts of other persons. It is the further intent of the Legislature that all agencies, departments, boards and commissions of the state and political subdivisions of the state shall cooperate with the Attorney General's Office in carrying out the provisions of this chapter.

**SOURCES:** Laws, 1990, ch. 509, § 2; Laws, 2004, ch. 355, § 3; Laws, 2005, ch. 507, § 2, eff from and after July 1, 2005.

**Amendment Notes** — The 2005 amendment, in the first sentence, deleted “and assisting” following “provide a method of compensating,” and added “and of assisting victims of crime through information referrals and advocacy outreach programs” at the end.

## RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

## § 99-41-5. Definitions.

As used in this chapter, unless the context otherwise requires, the term:

(a) “Allowable expense” means reasonable charges incurred for reasonably needed:

(i) Products, services and accommodations, including, but not limited to, medical care, rehabilitation, rehabilitative occupational training and other remedial treatment and care, but not to exceed Fifteen Thousand Dollars (\$15,000.00);

(ii) Mental health counseling and care not to exceed Three Thousand Five Hundred Dollars (\$3,500.00) for the victim and victim’s family member; provided, however, if there is more than one (1) family member, the amount of compensation awarded shall be prorated and not to exceed Three Thousand Five Hundred Dollars (\$3,500.00);

(iii) Expenses related to funeral, cremation or burial, but not to exceed a total charge of Six Thousand Five Hundred Dollars (\$6,500.00) and transportation costs to arrange or attend services, but not to exceed Eight Hundred Dollars (\$800.00); and

(iv) Necessary expenses, including, but not limited to, temporary housing and relocation assistance for victims of domestic violence in imminent danger, crime scene cleanup, court-related travel, execution travel, property damage repair and replacement costs for windows, doors, locks or other security devices of a residential dwelling. The division shall establish, by administrative rule, guidelines and monetary limits for such expenses.

(b) “Claimant” means any of the following persons applying for compensation under this chapter:

(i) A victim;

(ii) A dependent of a victim who has died because of criminally injurious conduct;

(iii) The surviving parent, spouse, child or any person who is legally obligated to pay or has paid medical, funeral or other allowable expenses incurred as a result of the victim’s death;

(iv) Family members of the victim who incur mental health counseling expenses as a result of the victim’s death; or

(v) A person authorized to act on behalf of any of the persons enumerated in subparagraphs (i), (ii), (iii) and (iv) of this paragraph;

however, "claimant" shall not include any of the following: provider or creditor of victim; assignee of provider or creditor, including a collection agency; or another person or entity other than those enumerated in this paragraph.

(c) "Collateral source" means a source of benefits or advantages for economic loss for which the claimant would otherwise be eligible to receive compensation under this chapter which the claimant has received, or which is readily available to the claimant, from any one or more of the following:

- (i) The offender;
- (ii) The government of the United States or any agency thereof, a state or any of its political subdivisions or an instrumentality of two (2) or more states;
- (iii) Social security, Medicare and Medicaid;
- (iv) Workers' compensation;
- (v) Wage continuation programs of any employer;
- (vi) Proceeds of a contract of insurance payable to the claimant for loss which the victim sustained because of the criminally injurious conduct;
- (vii) A contract providing prepaid hospital and other health care services or benefits for disability; or
- (viii) Any temporary nonoccupational disability insurance.

(d) "Criminally injurious conduct" means an act occurring or attempted within the geographical boundaries of this state, or to a resident of Mississippi while that resident is within any other state of the United States or any foreign country, which state or foreign country does not provide compensation for those injuries caused by an act for which compensation would be available had the act occurred in Mississippi, and which act results in personal injury or death to a victim for which punishment by fine, imprisonment or death may be imposed. For purposes of this chapter, "criminally injurious conduct" shall also include federal offenses committed within the state that result in personal injury or death to a victim and which are punishable by fine, imprisonment or death, and delinquent acts as defined in Section 43-21-105 which result in personal injury or death to a victim and which, if committed by an adult, would be a crime punishable by fine, imprisonment or death.

(e) "Dependent" means a natural person wholly or partially dependent upon the victim for care or support, and includes a child of the victim born after the death of the victim where the death occurred as a result of criminally injurious conduct.

(f) "Economic loss of a dependent" means loss, after death of the victim, of contributions or things of economic value to the dependent, not including services which would have been received from the victim if he or she had not suffered the fatal injury, less expenses of the dependent avoided by reason of death of the victim.

(g) "Economic loss" means monetary detriment consisting only of allowable expense, work loss and, if injury causes death, economic loss of a



dependent, but shall not include noneconomic loss or noneconomic detriment.

(h) "Family member" means the victim's spouse, parent, grandparent, stepparent, child, stepchild, grandchild, brother, sister, half brother, half sister or spouse's parent.

(i) "Noneconomic loss or detriment" means pain, suffering, inconvenience, physical impairment and nonpecuniary damage.

(j) "Work loss" means loss of income from work the victim or claimant would have performed if the victim had not been injured, but reduced by any income from substitute work actually performed by the victim or claimant or by income the victim or claimant would have earned in available appropriate substitute work that he or she was capable of performing, but unreasonably failed to undertake.

(k) "Victim" means a person who suffers personal injury or death as a result of criminally injurious conduct, regardless of whether that person was the intended victim of the criminally injurious conduct. This definition may include a person who suffers personal injury or death as a result of criminally injurious conduct while going to the aid of another person or a duly sworn law enforcement officer, or while attempting to prevent a crime from occurring.

**SOURCES:** Laws, 1990, ch. 509, § 3; Laws, 1996, ch. 506, § 1; Laws, 1998, ch. 484, § 1; Laws, 2002, ch. 352, § 1; Laws, 2004, ch. 355, § 4; Laws, 2007, ch. 587, § 2, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment, in (a), substituted "Fifteen Thousand Dollars (\$15,000.00)" for "Ten Thousand Dollars (\$10,000.00)" in (i), substituted "Six Thousand Five Hundred Dollars (\$6,500.00)" for "Four Thousand Five Hundred Dollars (\$4,500.00)" and "Eight Hundred Dollars (\$800.00)" for "Five Hundred Dollars (\$500.00)" in (iii), and added (iv); in (b), added (iii) and (iv) and redesignated former (iii) as present (v), and substituted "subparagraphs (i), (ii), (iii) and (iv) of this paragraph" for "subparagraphs (i) and (ii) of this paragraph" in (v); substituted the present last sentence of (d) for the former last sentence, which read: "The term shall also apply to federal offenses committed within the state and delinquent acts as defined in Section 43-21-105 which meet this definition"; added "regardless of whether ... prevent a crime from occurring" at the end of (k); and made minor stylistic changes throughout.

### ATTORNEY GENERAL OPINIONS

The words of limitation expressed in § 99-41-5(b)(iii) preclude an estate from being a claimant under the Crime Victims' Compensation Program. Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

The Crime Victims' Compensation Program is justified in withholding an award of compensation until the medical provider has determined what, if any, discount will be given to the claimant and made demand for payment on claimant.

Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

There is no authority to give an award of compensation prior to the medical provider determining what, if any, discount will be given, and has demanded payment. Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

A discount program provided by a medical provider for individuals who may not be in a financial position to pay for medi-

cal services could be considered “a source of benefits or advantages” to be considered as a collateral source under § 99-41-5(c)

and/or an “other source” under § 99-41-17(2)(a). Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

### RESEARCH REFERENCES

**ALR.** Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 A.L.R.5th 467.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages. 52 A.L.R.5th 1.

## § 99-41-7. Division of Victim Compensation; Director of Victim Compensation; duties; appointment.

There is hereby created in the Attorney General’s Office the Division of Victim Compensation, hereafter referred to as “division.” In the Division of Victim Compensation there is hereby created the position of Director of Victim Compensation, hereafter referred to as “director.” The duties of the director shall include receipt, investigation, verification and adjudication of a claim for compensation under the provisions of this chapter. The duties shall also include facilitating assistance to victims of crime through information referrals, advocacy outreach programs and other victim-related services. The director shall be appointed by the Attorney General.

**SOURCES:** Laws, 1990, ch. 509, § 4; Laws, 1996, ch. 506, § 2; Laws, 2004, ch. 355, § 5; Laws, 2005, ch. 507, § 3; Laws, 2007, ch. 587, § 3, eff from and after July 1, 2007.

**Amendment Notes** — The 2005 amendment inserted the next-to-last sentence.

The 2007 amendment added “through information referrals, advocacy outreach programs and other victim-related services” at the end of the next-to-last sentence.

**Cross References** — Additional powers and duties of director, see § 99-41-11.

False claims, penalties, see § 99-41-27.

## § 99-41-9. Powers and duties of division.

In addition to any other powers and duties specified elsewhere in this chapter, the division is hereby authorized to:

(a) Except as otherwise provided by this chapter, regulate the procedures for the director to expedite his functions and adopt rules and regulations for the position of director;

(b) Define any term not defined in this chapter in a manner not inconsistent with this chapter;

(c) Prescribe forms necessary to carry out the purposes of this chapter and make such forms available for use in making applications for compensation;

(d) Authorize the director to take judicial notice of general, technical and scientific facts within the director’s specialized knowledge;

(e) Publicize the availability of compensation and information regarding the filing of claims and ask that public officials and law enforcement

agencies take reasonable care that victims be informed about the availability of compensation and the procedure for applying for compensation;

(f) Apply for funds from and to submit all necessary forms to any federal agency participating in a cooperative program to compensate victims of crimes, and to apply for and accept any gifts, bequests, grants, donations or funds from other sources, public or private, for carrying out the provisions of this chapter; and

(g) Adopt such rules and regulations as shall be necessary for carrying out the provisions of this chapter.

**SOURCES:** Laws, 1990, ch. 509, § 5; Laws, 1996, ch. 506, § 3; Laws, 2004, ch. 355, § 6, eff from and after passage (approved Apr. 20, 2004.)

### RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

### **§ 99-41-11. Additional powers and duties of director; conduct of hearing; record.**

(1) The director shall award compensation for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for compensation have been met.

(2) The director shall make such investigations, administer such oaths or affirmations and receive such evidence as he deems relevant and necessary to make a determination on any application received. The director shall have the power to subpoena witnesses, compel their attendance and require the production of records and other evidence. Application to a court for aid in enforcing a subpoena may be made in the name of the director. To the extent that funds are appropriated or otherwise available, the attorney General may employ such personnel, including expert witnesses, as may be required in connection with particular applications before the director, and the director may take judicial notice of general, technical and scientific facts within his specialized knowledge.

(3) The director may settle a claim by stipulation, agreed settlement, consent order or default.

(4) The director may request access to and obtain from prosecuting attorneys or law enforcement officers, as well as state and local agencies, any reports of investigations or other data necessary to assist the director in making a determination of eligibility for compensation under the provisions of this chapter.

(5) Notwithstanding any other provision of law, every law enforcement agency and prosecuting attorney in the state shall provide to the director, upon request, a complete copy of the report regarding the incident and any supplemental reports involving the crime or incident giving rise to a claim filed pursuant to this chapter within thirty (30) days of such request.



(6) Any statute providing for the confidentiality of a claimant or victim's court record shall not be applicable under this chapter, notwithstanding the provisions of any other law to the contrary; provided, however, any such record or report which is otherwise protected from public disclosure by the provisions of any other law shall otherwise remain subject to the provisions of such law.

(7) The director may require that the claimant submit with the application material substantiating the facts stated in the application.

(8) After processing an application for compensation filed under rules and regulations promulgated by the Attorney General, the director shall enter an order stating:

- (a) Findings of fact;
- (b) The decision as to whether or not compensation shall be awarded;
- (c) The amount of compensation, if any, due under this chapter;
- (d) The person or persons to whom any compensation should be paid;
- (e) The percentage share of the total of any compensation award and the dollar amount each person shall receive; and
- (f) Whether disbursement of any compensation awarded shall be made in a lump sum or in periodic payments.

(9) The director on his own motion or on request of the claimant may reconsider a decision granting or denying an award or determining its amount. An order on reconsideration of an award shall not require a refund of amounts previously paid unless the award was obtained by fraud.

(10) If a claimant disagrees with the decision of the director, he may contest such decision to the Attorney General within thirty (30) days after notification of issuance of the decision. There shall be no appeal of a decision of the director except as set forth in this subsection.

(11) In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice pursuant to regulations promulgated pursuant to this chapter and may offer evidence and argument on any issue relevant to the claim and may examine witnesses and offer evidence in reply to any matter of an evidentiary nature relevant to the claim. The Attorney General shall have the power to subpoena witnesses, compel their attendance and require the production of records and other evidence. The decision of the Attorney General becomes the final decision. A record of the hearing in a contested case shall be made and shall be transcribed upon request of any party who shall pay transcription costs unless otherwise ordered by the Attorney General.

**SOURCES:** Laws, 1990, ch. 509, § 6; Laws, 1996, ch. 506, § 4; Laws, 2000, ch. 577, § 1; Laws, 2004, ch. 355, § 7; Laws, 2007, ch. 587, § 4, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment substituted “thirty (30) days” for “fifteen (15) days” in (10).

**Cross References** — Additional duties of director, see § 99-41-7.

Appeal of compensation order, see § 99-41-13.

## ATTORNEY GENERAL OPINIONS

Pursuant to Section 99-41-11 the District Attorney's office may advise the Victim Compensation Hearing Officer that a

particular person has not been indicted by a particular grand jury. McDonald, January 10, 1996, A.G. Op. #95-0860.

## RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

## § 99-41-13. Appeals.

Any claimant aggrieved by a final decision of the Attorney General shall be entitled to judicial review thereof in the manner provided in this section.

(a) An appeal may be taken by such claimant to the circuit court of the claimant's residence or the Circuit Court of the First Judicial District of Hinds County by filing a petition with the clerk of the court and executing and filing bond payable to the State of Mississippi with sufficient sureties to be approved by the clerk of the court, conditioned upon the payment of all costs of appeal, including the cost of preparing the transcript of the hearing before the Attorney General. The petition and bond shall be filed within thirty (30) days of the receipt of the final decision of the Attorney General. Upon approval of the bond, the clerk of the court shall notify the Office of the Attorney General, which shall prepare its record in the matter and transmit it to the circuit court.

(b) The scope of review of the circuit court in such cases shall be limited to a review of the record made before the Attorney General to determine if the action of the Attorney General is unlawful for the reason that it was:

- (i) Not supported by a preponderance of the evidence;
- (ii) Arbitrary and capricious; or
- (iii) In violation of a statutory right of claimant.

(c) No relief shall be granted based upon the court's finding of harmless error.

(d) Any party aggrieved by action of the circuit court may appeal to the Supreme Court in the manner provided by law.

**SOURCES:** Laws, 1990, ch. 509, § 7; Laws, 1996, ch. 506, § 5; Laws, 2000, ch. 577, § 2; Laws, 2004, ch. 355, § 8, eff from and after passage (approved Apr. 20, 2004.)

**Cross References** — Appeals to the Supreme Court generally, see §§ 99-35-101 et seq.

## § 99-41-15. Filing of claim as waiver of physician-patient confidentiality; ordering mental or physical examination or autopsy.

(1) Any person filing a claim under the provisions of this chapter shall be

deemed to have waived any physician-patient privilege as to the communications or records relevant to an issue of the physical, mental or emotional conditions of the claimant. However, any record or report obtained by the director, the confidentiality of which is otherwise protected by any other law or regulation, shall remain confidential, subject to such law or regulation.

(2) If the mental, physical or emotional condition of a claimant is material to a claim, the director, upon good cause shown, may order the claimant to submit to a mental or physical examination and may order an autopsy of a deceased victim. The order shall specify the time, place, manner, conditions and scope of the examination or autopsy and the person by whom it is to be made. The order shall also require the person to file with the director a detailed written report of the examination or autopsy. The report shall set out the findings of the person making the report, including the results of all tests made, the diagnosis, prognosis and other conclusions and reports of earlier examinations of the same conditions.

(3) The director shall furnish a copy of the report examined. If the victim is deceased the director shall furnish a copy of the report to the claimant on request.

(4) The director may require the claimant to supply any additional medical or psychological reports available relating to the injury or death for which compensation is claimed.

**SOURCES:** Laws, 1990, ch. 509, § 8; Laws, 1996, ch. 506, § 6, eff from and after July 1, 1996.

**Cross References** — False claims, penalties, see § 99-41-27.

## **§ 99-41-17. Compensation awards; conditions; exceptions; reduction.**

(1) Compensation shall not be awarded under this chapter:

(a) Unless the criminally injurious conduct occurred after July 1, 1991;

(b) Unless the claim has been filed with the director within thirty-six (36) months after the crime occurred, or in cases of child sexual abuse, within thirty-six (36) months after the crime was reported to law enforcement or the Department of Human Services, but in no event later than the child's twenty-first birthday. For good cause, the director may extend the time period allowed for filing a claim for an additional period not to exceed twelve (12) months;

(c) To a claimant or victim who was the offender or an accomplice to the offender, or, except in cases of children under the age of consent as specified in Section 97-3-65, 97-3-97 or 97-5-23, Mississippi Code of 1972, who encouraged or in any way knowingly participated in criminally injurious conduct;

(d) To another person, if the award would unjustly benefit the offender or accomplice;



(e) Unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within seventy-two (72) hours after its occurrence or unless it is found that there was good cause for the failure to report within such time;

(f) To any claimant or victim when the injury or death occurred while the victim was confined in any federal, state, county or city jail or correctional facility;

(g) If the victim was injured as a result of the operation of a motor vehicle, boat or airplane, unless the vehicle was used by the offender (i) while under the influence of alcohol or drugs, (ii) as a weapon in the deliberate attempt to injure or cause the death of the victim, (iii) in a hit-and-run accident by leaving the scene of an accident as specified in Section 63-3-401, or (iv) to flee apprehension by law enforcement as specified in Sections 97-9-72 and 97-9-73;

(h) If, following the filing of an application, the claimant failed to take further steps as required by the division to support the application within forty-five (45) days of such request made by the director or failed to otherwise cooperate with requests of the director to determine eligibility, unless failure to provide information was beyond the control of the claimant;

(i) To a claimant or victim who, subsequent to the injury for which application is made, is convicted of any felony, and the conviction becomes known to the director;

(j) To any claimant or victim who has been previously convicted as, or otherwise meets the definition of, a habitual criminal as defined in Section 99-19-81;

(k) To any claimant or victim who, at the time of the criminally injurious conduct upon which the claim for compensation is based, engaged in conduct unrelated to the crime upon which the claim for compensation is based that either was (i) a felony, or (ii) a delinquent act which, if committed by an adult, would constitute a felony.

(2) Compensation otherwise payable to a claimant shall be diminished to the extent:

(a) That the economic loss is recouped from other sources, including collateral sources; and

(b) Of the degree of responsibility for the cause of injury or death attributable to the victim or claimant.

(3) Upon a finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies and prosecuting attorneys, an award of compensation may be denied, withdrawn or reduced.

(4) Compensation otherwise payable to a claimant or victim may be denied or reduced to a claimant or victim who, at the time of the crime upon which the claim for compensation is based, was engaging in or attempting to engage in other unlawful activity unrelated to the crime upon which the claim for compensation is based.

**SOURCES:** Laws, 1990, ch. 509, § 9; Laws, 1996, ch. 506, § 7; Laws, 1998, ch. 484, § 2; Laws, 2000, ch. 577, § 3; Laws, 2004, ch. 355, § 9; Laws, 2007, ch. 587, § 5, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment, in (1)(b), substituted “thirty-six (36) months” for “twenty-four months” both times it appears, and added the last sentence; added (1)(g)(iii); deleted “which is a violation of the Controlled Substances Act, or in which a weapon was used or possessed or in which any personal injury was committed or attempted” following “convicted of any felony” in (1)(i); added (1)(j) and (k); added (4); and made minor stylistic changes.

**Cross References** — Calculation of award, see § 99-41-23.

Advance award, see § 99-41-25.

False claims, penalties, see § 99-41-27.

Crime Victims’ Compensation Fund created to provide for the payment of awards of compensation, see § 99-41-29.

### ATTORNEY GENERAL OPINIONS

A discount program provided by a medical provider for individuals who may not be in a financial position to pay for medical services could be considered “a source of benefits or advantages” to be considered as a collateral source under § 99-41-5(c) and/or an “other source” under § 99-41-17(2)(a). Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

The Crime Victims’ Compensation Program is justified in withholding an award of compensation until the medical pro-

vider has determined what, if any, discount will be given to the claimant and made demand for payment on claimant. Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

There is no authority to give an award of compensation prior to the medical provider determining what, if any, discount will be given, and has demanded payment. Anderson, Oct. 25, 2002, A.G. Op. #02-0498.

### RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

## § 99-41-19. Proof of conviction as evidence; suspension of proceedings pending prosecution.

Proof of conviction of a person whose acts give rise to a claim shall be conclusive evidence that the crime was committed unless an application for rehearing, an appeal of the conviction or certiorari is pending or unless a rehearing and new trial has been ordered. The director may suspend the proceedings before it pending disposition of a criminal prosecution that has been commenced or is imminent.

**SOURCES:** Laws, 1990, ch. 509, § 10; Laws, 1996, ch. 506, § 8, eff from and after July 1, 1996.

**RESEARCH REFERENCES**

**Am Jur.** 29 Am. Jur. 2d, Evidence  
§§ 404 et seq.

**§ 99-41-21. Repayment of compensation; subrogation of state.**

(1) If compensation is awarded the state shall be subrogated to all the rights of a claimant to receive or recover from a collateral source to the extent that compensation was awarded.

(2) In the event that the claimant recovers compensation, other than under the provisions of this chapter, for injuries or death resulting from criminally injurious conduct, the claimant shall retain, as trustee, so much of the recovered funds as necessary to reimburse the Crime Victims' Compensation Fund, as created in Section 99-41-29, to the extent that compensation was awarded to the claimant from such fund. Such funds as are retained in trust under the provisions of this section shall be promptly deposited in the Crime Victims' Compensation Fund created in Section 99-41-29.

(3) If a claimant brings an action to recover damages related to the criminally injurious conduct upon which compensation is claimed or awarded, the claimant shall give the director written notice of the action. After receiving such notice the director may join in the action as a party plaintiff to recover any compensation awarded.

**SOURCES:** Laws, 1990, ch. 509, § 11; Laws, 1996, ch. 506, § 9, eff from and after July 1, 1996.

**RESEARCH REFERENCES**

**ALR.** Statutes providing for governmental compensation for victims of crime.  
20 A.L.R.4th 63.

**§ 99-41-23. Calculation of award; payment in installments; assignment of award.**

(1) Compensation for work loss may not exceed Six Hundred Dollars (\$600.00) per week, not to exceed fifty-two (52) weeks; the total amount of the award may not exceed the aggregate limitation of this section.

(2) Compensation for economic loss of a dependent may not exceed Six Hundred Dollars (\$600.00) per week not to exceed fifty-two (52) weeks; provided, however, if there is more than one (1) dependent per victim the amount of compensation awarded shall be prorated among the dependents and the total amount of the award may not exceed the aggregate limitation of this section.

(3) In the event of the victim's death, compensation for work loss of claimant may not exceed Six Hundred Dollars (\$600.00) per week not to exceed one (1) week; provided, however, if there is more than one (1) claimant per victim, the amount of compensation awarded shall be prorated among the



claimants and the total amount of the award may not exceed Six Hundred Dollars (\$600.00).

(4) Compensation payable to a victim and to all other claimants sustaining economic loss because of injury to or death of that victim may not exceed Twenty Thousand Dollars (\$20,000.00) in the aggregate.

(5) A determination that compensation shall be awarded may provide for payment to a claimant in a lump sum or in installments. All medical bills may be paid directly to affected health care providers. At the request of the claimant, the director may convert future economic loss, other than allowable expense, to a lump sum, but only upon a finding of either of the following:

(a) That the award in a lump sum will promote the interests of the claimant; or

(b) That the present value of all future economic loss, other than allowable expense, does not exceed One Thousand Dollars (\$1,000.00).

(6) An award payable in installments for future economic loss may be made only for a period as to which the future economic loss can reasonably be determined. An award payable in installments for future economic loss may be modified upon findings that a material and substantial change of circumstances has occurred.

(7) An award shall not be subject to execution, attachment, garnishment or other process, except that an award shall not be exempt from orders for the withholding of support for minor children, and except that an award for allowable expense shall not be exempt from a claim of a creditor to the extent that such creditor has provided products, services or accommodations, the costs of which are included in the award.

(8) An assignment by the claimant to any future award under the provisions of this chapter is unenforceable, except:

(a) An assignment of any award for work loss to assure payment of court-ordered alimony, maintenance or child support; or

(b) An assignment for any award for allowable expense to the extent that the benefits are for the cost of products, services or accommodations necessitated by the injury or death on which the claim is based and which are provided or are to be provided by the assignee.

(9) Subsections (7) and (8) of this section prevail over Sections 75-9-406 and 75-9-408 of Article 9 of the Uniform Commercial Code to the extent, if any, that Sections 75-9-406 and 75-9-408 may otherwise be applicable.

**SOURCES:** Laws, 1990, ch. 509, § 12; Laws, 1996, ch. 506, § 10; Laws, 1998, ch. 484, § 3; Laws, 2000, ch. 577, § 4; Laws, 2001, ch. 495, § 32; Laws, 2002, ch. 352, § 2; Laws, 2007, ch. 587, § 6, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment substituted “Twenty Thousand Dollars (\$20,000.00)” for “Fifteen Thousand Dollars (\$15,000.00)” in (4).

**Cross References** — Award conditions, exceptions, reduction, see § 99-41-17.

Advance award, see § 99-41-25.

False claims, penalties, see § 99-41-27.

**Federal Aspects** — Victims of child abuse act of 1990, P. L. 101-647 §§ 201 et seq.

## RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

**§ 99-41-25. Advance award.**

If the director determines that the claim is one with respect to which an award probably will be made and the claimant will suffer financial hardship unless an advance award is made, an amount may be paid to the claimant not to exceed Five Hundred Dollars (\$500.00) and shall be deducted from the final award or shall be repaid by and recoverable from the claimant to the extent that it exceeds the final award.

**SOURCES:** Laws, 1990, ch. 509, § 13; Laws, 1996, ch. 506, § 11; Laws, 2000, ch. 577, § 5, *eff from and after July 1, 2000.*

**Cross References** — Award conditions, exceptions, reduction, see § 99-41-17.

Calculation of award, see § 99-41-23.

False claims, penalties, see § 99-41-27.

## RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime. 20 A.L.R.4th 63.

**§ 99-41-27. False claims; penalty.**

(1) Claims shall be made under oath. The filing of a false claim for compensation pursuant to this chapter shall constitute a misdemeanor and shall be punishable by a fine of not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for a term not to exceed one (1) year, or by both such fine and imprisonment, and the person convicted shall, as part of the sentence in either case, be required to repay to the Crime Victims' Compensation Fund the amount received pursuant to the false claim.

(2) Any person who shall knowingly furnish any false information or knowingly fails or omits to disclose a material fact or circumstance with the intent to defraud the division for compensation pursuant to this chapter shall be guilty of a misdemeanor and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for a term not to exceed one (1) year, or both, and the person convicted shall, as part of the sentence in either case, be required to repay to the Crime Victims' Compensation Fund the total amount received pursuant to the false claim.

(3) If a payment or overpayment of compensation is made because of clerical error, mistaken identity, innocent misrepresentation by or on behalf of the recipient of the compensation award or other circumstances of a similar nature not induced by fraud by or on behalf of the recipient, the recipient is

liable for repayment of the compensation. The division may waive, decrease or adjust the amount of the repayment of the compensation.

**SOURCES:** Laws, 1990, ch. 509, § 14; Laws, 1996, ch. 506, § 12; Laws, 2004, ch. 355, § 10, eff from and after passage (approved Apr. 20, 2004.)

**Cross References** — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Award conditions, exceptions, reduction, see § 99-41-17.

Calculation of award, see § 99-41-23.

Advance award, see § 99-41-25.

## § 99-41-29. Crime Victims' Compensation Fund.

(1) From and after July 1, 1990, there is hereby created in the State Treasury a special interest-bearing fund to be known as the Crime Victims' Compensation Fund. The monies contained in the fund shall be held in trust for the sole purpose of payment of awards of compensation to victims and claimants pursuant to this chapter, the payment of all necessary and proper expenses incurred by the division in the administration of this chapter, payment of sexual assault examinations pursuant to Section 99-37-25, and payment of other expenses in furtherance of providing assistance to victims of crime through information referrals, advocacy outreach programs and victim-related services. Expenditures from the fund shall be paid by the State Treasurer upon warrants issued by the Department of Finance and Administration, and upon requisitions signed by the Attorney General or his duly designated representative in the manner provided by law. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of: (a) monies appropriated by the Legislature for the purposes of compensating the victims of crime and other claimants under this chapter; (b) the interest accruing to the fund; (c) monies recovered by the director under the provisions of Section 99-41-21; (d) monies received from the federal government; and (e) monies received from such other sources as may be provided by law.

(2) No compensation payments shall be made which exceed the amount of money in the fund. The state shall not be liable for a written order to pay compensation, except to the extent that monies are available in the fund on the date the award is ordered. The Attorney General shall establish such rules and regulations as shall be necessary to adjust awards and payments so that the total amount awarded does not exceed the amount of money on deposit in the fund. Such rules and regulations may include, but shall not be limited to, the authority to provide for suspension of payments and proportioned reduction of benefits to all claimants; provided, however, no such reductions as provided for shall entitle claimants to future retroactive reimbursements in future years.

**SOURCES:** Laws, 1990, ch. 509, § 15; Laws, 1993, ch. 517, § 1; Laws, 1994, ch. 388, § 1; Laws, 1996, ch. 506, § 13; Laws, 2004, ch. 355, § 11; Laws, 2007, ch. 587, § 7, eff from and after July 1, 2007.



**Amendment Notes** — The 2007 amendment rewrote the second sentence, which formerly read: “The purpose of the fund shall be to provide for the payment of awards of compensation pursuant to this chapter and the payment of all necessary and proper expenses incurred by the division in the administration of this chapter.”

**Cross References** — Portion of payments by offender on probation, parole, or earned probation to be paid into Crime Victims' Compensation Fund, see § 47-7-49.

Reimbursement of Crime Victim's Compensation Fund by claimant upon receipt of compensation from other source, see § 99-41-21.

Calculation of award, see § 99-41-23.

Advance award, see § 99-41-25.

## RESEARCH REFERENCES

**ALR.** Statutes providing for governmental compensation for victims of crime.  
20 A.L.R.4th 63.

### § 99-41-31. Disclosure of records as to claims; confidentiality of records.

It is unlawful, except for purposes directly connected with the administration of the division, for any person to solicit, disclose, receive or make use of or authorize, knowingly permit, participate in or acquiesce in the use of any list, or names of, or information concerning persons applying for or receiving awards under this chapter without the written consent of the claimant or recipient. The records, papers, files and communications of the division, director, staff and agents must be regarded as confidential information and privileged and not subject to disclosure under any condition including the Mississippi Public Records Act of 1983.

**SOURCES:** Laws, 2000, ch. 577, § 6; Laws, 2004, ch. 355, § 12, eff from and after passage (approved Apr. 20, 2004.)

## CHAPTER 43

### Mississippi Crime Victims' Bill of Rights

#### SEC.

- 99-43-1. Short title and purpose.
- 99-43-3. Definitions.
- 99-43-5. Designated and lawful representatives.
- 99-43-7. Law enforcement notice requirements; clerk of court notice requirements.
- 99-43-9. Prosecutor notice requirements upon written request of victim.
- 99-43-11. Prosecutor's duty to confer with victim prior to disposition.
- 99-43-13. Prosecutor's duty to confer with victim prior to trial; confidentiality.
- 99-43-15. Trial transcripts; right to receive if pay costs.
- 99-43-17. Victim not entitled to direct prosecution of case.
- 99-43-19. Freedom from delay; continuances.
- 99-43-21. Right to be present at criminal proceedings.
- 99-43-23. Separate waiting area; minimizing contact with defendant, defendant's relatives and defense witnesses.
- 99-43-25. Victim residence and identification information; petition, hearing and confidentiality.
- 99-43-27. Negotiated plea agreements; notice and presence.
- 99-43-29. Notice regarding disposition and sentencing.
- 99-43-31. Victim impact statements to probation officers; duty to consider victim impact.
- 99-43-33. Victim impact statements during court proceedings.
- 99-43-35. Post-arrest release or escape and post-sentencing information.
- 99-43-37. Presence at court proceedings; oral or written statements by victim.
- 99-43-39. Return and release of victims' property.
- 99-43-41. Custodial agency notice requirements.
- 99-43-43. Victim statement or recording for Department of Corrections records; notice regarding parole or pardon proceedings; notice regarding change in custodial status proceedings.
- 99-43-45. Testimony and preparation for criminal proceeding free from threat or fear of losing employment.
- 99-43-47. Prosecutor assertion of victims' rights.
- 99-43-49. Failure to provide victim's right; effect; reasonable attempts to provide notice.

#### § 99-43-1. Short title and purpose.

This chapter may be cited as the "Mississippi Crime Victims' Bill of Rights." The purpose of this chapter is to ensure the fair and compassionate treatment of victims of crime, to increase the effectiveness of the criminal justice system by affording rights and considerations to the victims of crime, and to preserve and protect victims' rights to justice and fairness in the criminal justice system.

**SOURCES:** Laws, 1998, ch. 577, § 1, eff from and after January 1, 1999.

**Editor's Note —** Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by

Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people.”

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Victim impact statement act, see §§ 99-19-151 et seq.

## JUDICIAL DECISIONS

### 1. Victim Impact Statement.

Victim's sister testified as to the victim's role in her family and the community, that the victim moved to help her daughter raise her granddaughter in the country, and how the sister has now had to assume the victim's role as head of the family. The victim impact evidence offered was proper

and necessary to a development of the case and true characteristics of the victim and could not serve in any way to incite the jury; thus, it was properly admitted. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

## RESEARCH REFERENCES

**ALR.** Validity, construction, and application of state constitutional or statutory victims' bill of rights. 91 A.L.R.5th 343.

### § 99-43-3. Definitions.

As used in this chapter, the following words shall have the meanings ascribed to them unless the context clearly requires otherwise:

(a) “Accused” means a person who has been arrested for committing a criminal offense and who is held for an initial appearance or other proceeding before trial or who is a target of an investigation for committing a criminal offense.

(b) “Appellate proceeding” means an oral argument held in open court before the Mississippi Court of Appeals, the Mississippi Supreme Court, a federal court of appeals or the United States Supreme Court.

(c) “Arrest” means the actual custodial restraint of a person or his submission to custody.

(d) “Community status” means extension of the limits of the places of confinement of a prisoner through work release, intensive supervision, house arrest and initial consideration of pre-discretionary leave, passes and furloughs.

(e) “Court” means all state courts including juvenile courts.

(f) “Victim assistance coordinator” means a person who is employed or authorized by a public entity or a private entity that receives public funding primarily to provide counseling, treatment or other supportive assistance to crime victims.



(g) "Criminal offense" means conduct that gives a law enforcement officer or prosecutor probable cause to believe that a felony involving physical injury, the threat of physical injury, a sexual offense, any offense involving spousal abuse or domestic violence has been committed.

(h) "Criminal proceeding" means a hearing, argument or other matter scheduled by and held before a trial court but does not include a lineup, grand jury proceeding or other matter not held in the presence of the court.

(i) "Custodial agency" means a municipal or county jail, the Department of Corrections, juvenile detention facility, Department of Youth Services or a secure mental health facility having custody of a person who is arrested or is in custody for a criminal offense.

(j) "Defendant" means a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense.

(k) "Final disposition" means the ultimate termination of the criminal prosecution of a defendant by a trial court, including dismissal, acquittal or imposition of a sentence.

(l) "Immediate family" means the spouse, parent, child, sibling, grandparent or guardian of the victim, unless that person is in custody for an offense or is the accused.

(m) "Lawful representative" means a person who is a member of the immediate family or who is designated as provided in Section 99-43-5; no person in custody for an offense or who is the accused may serve as lawful representative.

(n) "Post-arrest release" means the discharge of the accused from confinement on recognizance, bond or other condition.

(o) "Post-conviction release" means parole or discharge from confinement by an agency having custody of the prisoner.

(p) "Post-conviction relief proceeding" means a hearing, argument or other matter that is held in any court and that involves a request for relief from a conviction, sentence or adjudication.

(q) "Prisoner" means a person who has been convicted or adjudicated of a criminal offense against a victim and who has been sentenced to the custody of the sheriff, the Department of Corrections, Department of Youth Services, juvenile detention facility, a municipal jail or a secure mental health facility.

(r) "Prosecuting attorney" means the district attorney, county prosecuting attorney, municipal prosecuting attorney, youth court prosecuting attorney, special prosecuting attorney or Attorney General.

(s) "Right" means any right granted to the victim by the laws of this state.

(t) "Victim" means a person against whom the criminal offense has been committed, or if the person is deceased or incapacitated, the lawful representative.

**SOURCES:** Laws, 1998, ch. 577, § 2; Laws, 2004, ch. 355, § 1, eff from and after passage (approved Apr. 20, 2004.)

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Probation and parole law generally, see §§ 47-7-1 et seq.

### § 99-43-5. Designated and lawful representatives.

(1) If a victim is physically or emotionally unable to exercise any right established by this chapter, but is able to designate in writing a lawful representative, the designated representative or person may exercise the same rights that the victim is entitled to exercise. The victim may revoke his or her designated representation at any time and thereafter personally exercise his or her rights.

(2) If a victim is incompetent, deceased or otherwise incapable of designating another person to act in his or her behalf, the court may appoint a lawful representative who is not a witness in the case. If at any time the victim is no longer incompetent, incapacitated, or otherwise incapable of acting, the victim may personally exercise his or her rights.

(3) If the victim is a minor, the parent, guardian or other immediate family of the victim, or a designated representative as determined by the court, may exercise all of the rights of the victim on behalf of the victim.

**SOURCES:** Laws, 1998, ch. 577, § 3, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Victim impact statement act, see §§ 99-19-151 et seq.

### § 99-43-7. Law enforcement notice requirements; clerk of court notice requirements.

(1) Unless the victim is unavailable or incapacitated as a result of the

crime, within seventy-two (72) hours after the law enforcement agency becomes responsible for investigating the crime, the law enforcement agency shall provide to the victim in a manner and form prescribed by the Attorney General the following information:

- (a) The availability of emergency and crisis services.
- (b) The availability of victims' compensation benefits and the address and telephone number of the Victim Compensation Division.
- (c) The name of the law enforcement officer and telephone number of the law enforcement agency with the following statement attached: "If within sixty (60) days you are not notified of an arrest in your case, you may call the telephone number of the law enforcement agency for the status of the case."
- (d) The procedural steps involved in a criminal prosecution.
- (e) The rights authorized by the Mississippi Constitution on rights of victims, including a form to invoke these rights.
- (f) The existence of and eligibility requirements for restitution and compensation pursuant to Section 99-37-1 et seq. and Section 99-41-1 et seq., Mississippi Code of 1972.
- (g) A recommended procedure if the victim is subjected to threats or intimidation.
- (h) The name and telephone number of the office of the prosecuting attorney to contact for further information.

(2) In the event a victim initiates proceedings against a person by filing an affidavit, petition or complaint in a court of competent jurisdiction, the clerk of the court shall provide the victim with the information set forth in subsection (1); however, in lieu of the information set forth in subsection (1) (c), the clerk shall advise the victim of the name and telephone number of the law enforcement agency to which the complaint will be referred. This information shall be provided on a form prescribed by the Attorney General. Failure of the clerk of court to provide such information shall not subject the clerk to any criminal or civil liability.

**SOURCES:** Laws, 1998, ch. 577, § 4; Laws, 2007, ch. 587, § 8, eff from and after July 1, 2007.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.



**Amendment Notes** — The 2007 amendment added (2); and in (1)(b), deleted “name” preceding “address” and substituted “Victim Compensation Division” for “Victim Compensation hearing officer.”

**Cross References** — Restitution to victims of crimes, see §§ 99-37-1 et seq.

Mississippi Crime Victims' Compensation Act, see §§ 99-41-1 et seq.

Prosecutor notice requirements upon written request of victim, see § 99-43-9.

Upon request for notice, custodial agency to provide victim certain information, see § 99-43-41.

### **§ 99-43-9. Prosecutor notice requirements upon written request of victim.**

(1) Upon written request of the victim, the prosecuting attorney shall notify the victim of all charges filed against the defendant and any criminal proceedings, other than initial appearances, as soon as practicable, including any changes that may occur.

(2) In order to be entitled to receive notice under this section, the victim shall provide to and maintain with the office of the prosecuting attorney a request for notice which shall include the telephone number and address of the victim. The request for notice shall be considered withdrawn and void in the event the victim fails to update this information as necessary. Except as otherwise provided, all notices provided to a victim pursuant to this chapter shall be on forms as specified by the Attorney General.

**SOURCES:** Laws, 1998, ch. 577, § 5, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

“SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people.”

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Law enforcement notice requirements, see § 99-43-7.

Prosecutor's duty to confer with victim prior to disposition, see § 99-43-11.

Prosecutor's duty to confer with victim prior to trial, see § 99-43-13.

Upon request for notice, custodial agency to provide victim certain information, see § 99-43-41.

Statewide automated victim information and notification system generally, see §§ 99-45-1 et seq.

### **§ 99-43-11. Prosecutor's duty to confer with victim prior to disposition.**

The prosecuting attorney shall confer with the victim prior to the final disposition of a criminal offense, including the views of the victim about a nol

pros, reduction of charge, sentence recommendation, and pre-trial diversion programs.

**SOURCES:** Laws, 1998, ch. 577, § 6, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecutor's duty to confer with victim prior to trial, see § 99-43-13.

### **§ 99-43-13. Prosecutor's duty to confer with victim prior to trial; confidentiality.**

The prosecuting attorney shall confer with the victim before the commencement of a trial. Any information received by the victim relating to the substance of the case shall be confidential, unless otherwise authorized by law or required by the courts to be disclosed.

**SOURCES:** Laws, 1998, ch. 577, § 7, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecutor's duty to confer with victim prior to disposition, see § 99-43-11.

Victim not entitled to direct prosecution of case, see § 99-43-17.

### **§ 99-43-15. Trial transcripts; right to receive if pay costs.**

The victim has the right to receive a transcript of any criminal proceedings at his own cost.

**SOURCES:** Laws, 1998, ch. 577, § 8, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

### § 99-43-17. Victim not entitled to direct prosecution of case.

The rights of the victim do not include the authority to direct the prosecution of the case.

**SOURCES:** Laws, 1998, ch. 577, § 9, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecutor's duty to confer with victim prior to trial, see § 99-43-13.

Right to be present at criminal proceedings, see § 99-43-21.

### § 99-43-19. Freedom from delay; continuances.

The victim shall have the right to a final disposition of the criminal proceeding free from unreasonable delay. To effectuate this right, the court, in determining whether to grant any continuance, should make every reasonable effort to consider whether granting such continuance shall be prejudicial to the victim.

**SOURCES:** Laws, 1998, ch. 577, § 10, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.



Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecuting attorney to notify victim, upon written request of victim, of all charges filed against defendant and any criminal proceedings, see § 99-43-9.

### § 99-43-21. Right to be present at criminal proceedings.

The victim has the right to be present throughout all criminal proceedings as defined in Section 99-43-3.

**SOURCES:** Laws, 1998, ch. 577, § 11, eff from and after January 1, 1999.

**Editor's Note** — At the direction of the co-counsel for the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, the reference in this section to "Section 99-43-1" was changed to "Section 99-43-3."

Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Victim's right to be present at any proceeding at which negotiated plea for the person accused of committing the criminal offense against the victim will be presented to the court, see § 99-43-27.

### § 99-43-23. Separate waiting area; minimizing contact with defendant, defendant's relatives and defense witnesses.

The court shall provide a waiting area for the victim separate from the defendant, relatives of the defendant, and defense witnesses, if an area is available and the use of the area is practical. If a separate waiting area is not available, or its use impractical, the court shall minimize contact of the victim with the defendant, relatives of the defendant, and defense witnesses during court proceedings.

**SOURCES:** Laws, 1998, ch. 577, § 12, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Discretion of victim whether to exercise the right to be present at a court proceeding, see § 99-43-37.

### **§ 99-43-25. Victim residence and identification information; petition, hearing and confidentiality.**

(1) Based upon the reasonable apprehension of the victim of acts or threats of physical violence or intimidation by the defendant, the family of the defendant, or by anyone at the direction of the defendant, against the victim or the immediate family of the victim, the prosecutor may petition the court to direct that the victim or any other witness not be compelled to testify during pre-trial proceedings or in any trial, facts that could divulge the identity, residence, or place of employment of the victim, or other related information, without consent of the victim unless necessary to the prosecution of the criminal proceeding. If the court schedules a hearing on the merits of the petition, it shall be held in camera.

(2) The address, phone number, place of employment, and other related information about the victim contained in the prosecuting attorney's file shall not be public record.

**SOURCES:** Laws, 1998, ch. 577, § 13, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

### **§ 99-43-27. Negotiated plea agreements; notice and presence.**

The victim has the right to be present at any proceeding at which a negotiated plea for the person accused of committing the criminal offense against the victim will be presented to the court. The court shall not accept a plea agreement unless:

(a) The prosecuting attorney advises the court that, before requesting the negotiated plea, reasonable efforts were made to confer with the victim.

(b) Reasonable efforts were made to give the victim notice of the plea proceeding, including the offense to which the defendant will plead guilty, the date that the plea will be presented to the court, the terms of any sentence agreed to as part of the negotiated plea, and that the victim has the right to be present.

**SOURCES:** Laws, 1998, ch. 577, § 14, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

“SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people.”

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Right to be present at criminal proceedings, see § 99-43-21.

Discretion of victim whether to exercise the right to be present at court proceedings, see § 99-43-37.

Statewide automated victim information and notification system generally, see §§ 99-45-1 et seq.

## § 99-43-29. Notice regarding disposition and sentencing.

The prosecuting attorney shall provide to the victim the date of a conviction, acquittal, or dismissal of the charges filed against the defendant and prior to sentencing, when applicable, notice of the following:

(a) The criminal offense for which the defendant was convicted, acquitted, or the effect of a dismissal of the charges filed against the defendant.

(b) If the defendant is convicted, on request, the victim shall be notified, if applicable, of the following:

(i) The existence and function of the pre-sentence report.

(ii) The name, address, and telephone number of the office which is preparing the pre-sentence report.

(iii) The right to make a victim impact statement.

(iv) The right of the defendant to view the pre-sentence report.

(v) The right to be present and be heard at any sentencing proceeding.

(vi) The time, place and date of the sentencing proceeding.

(vii) If the court orders restitution, the right to pursue collection of the restitution as provided by Section 99-37-1 et seq., Mississippi Code of 1972.

**SOURCES:** Laws, 1998, ch. 577, § 15, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:



"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecutor's duty to confer with victim prior to disposition, see § 99-43-11.

Victim impact statements during court proceedings, see § 99-43-33.

Statewide automated victim information and notification system generally, see §§ 99-45-1 et seq.

### **§ 99-43-31. Victim impact statements to probation officers; duty to consider victim impact.**

The victim may submit a written impact statement or make an oral impact statement to the probation officer for use in preparing a pre-sentence report. The probation officer shall consider the economic, physical, and psychological impact that the criminal offense has had on the victim and the immediate family of the victim.

**SOURCES:** Laws, 1998, ch. 577, § 16, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Presentence reports generally, see § 47-7-9.

Presentence investigator to prepare and append to presentence evaluation report a written victim impact statement, see § 99-19-57.

### **§ 99-43-33. Victim impact statements during court proceedings.**

The victim has the right to present an impact statement or information that concerns the criminal offense or the sentence during any entry of a plea of guilty, sentencing or restitution proceeding.

**SOURCES:** Laws, 1998, ch. 577, § 17, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

“SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people.”

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

### **§ 99-43-35. Post-arrest release or escape and post-sentencing information.**

The victim has the right to the following information:

(a) As soon as practicable after the date of sentencing, the office of the prosecuting attorney shall notify the victim of the sentence imposed on the defendant.

(b) The names, addresses and telephone numbers of the appropriate agencies and departments to whom request for notice should be provided.

(c) The status of any post-conviction court review or appellate proceeding or any decisions arising from those proceedings shall be furnished to the victim by the Office of the Attorney General or the office of the district attorney, whichever is appropriate, within five (5) business days after the status is known.

(d) Upon any post-arrest release of the defendant, the sheriff or municipal jailer shall, upon request, notify the victim of the release of the defendant. In the case of domestic violence or sexual assault, the appropriate law enforcement agency shall make a reasonable attempt to notify the victim of the defendant's post-arrest release, regardless of the victim's exercise of the right to receive this information.

(e) The agency having physical custody of a prisoner shall, if provided a request for notice, and as soon as practicable, give notice to the victim of the escape and, subsequently, the return of the prisoner into custody.

**SOURCES:** Laws, 1998, ch. 577, § 18; Laws, 2007, ch. 587, § 9, eff from and after July 1, 2007.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

“SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people.”

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate

on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Amendment Notes** — The 2007 amendment, in (d), rewrote the first sentence, which formerly read: "If the terms and conditions of a post-arrest release include a requirement that the accused post a bond, the sheriff or municipal jailer shall, upon request, notify the victim of the release on bond of the defendant," and added the last sentence.

**Cross References** — Prosecutor notice requirements upon written request of victim, see § 99-43-9.

Notice regarding disposition and sentencing, see § 99-43-29.

Notice provided to victim by custodial agency, see § 99-43-41.

Statewide automated victim information and notification system generally, see §§ 99-45-1 et seq.

### **§ 99-43-37. Presence at court proceedings; oral or written statements by victim.**

It is the discretion of the victim to exercise the right to be present and heard, where authorized by law, at a court proceeding. The absence of the victim at the proceeding of the court does not preclude the court from going forward with the proceeding. The right of the victim to be heard may be exercised, where authorized by law, at the discretion of the victim, through an oral statement or submission of a written statement, or both.

**SOURCES:** Laws, 1998, ch. 577, § 19; Laws, 2004, ch. 355, § 2, eff from and after passage (approved Apr. 20, 2004.)

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Right to be present at criminal proceedings, see § 99-43-21.

### **§ 99-43-39. Return and release of victims' property.**

(1) Prior to the admission into evidence by the court, on request of the victim, after consultation and written approval by the prosecuting attorney, the law enforcement agency responsible for investigating the criminal offense shall return to the victim any property belonging to the victim that was taken during the course of the investigation, or shall inform the victim of the reasons why the property will not be returned. The law enforcement agency shall make reasonable efforts to return the property to the victim as soon as possible.

(2) If the property of the victim has been admitted as evidence during a trial or hearing, the court may, upon request of the prosecuting attorney, order



its release to the victim if a photograph can be substituted. If evidence is released pursuant to this subsection, the attorney for the defendant or investigator may inspect and independently photograph the evidence before it is released.

**SOURCES:** Laws, 1998, ch. 577, § 20, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

## § 99-43-41. Custodial agency notice requirements.

Any custodial agency having physical custody of the prisoner, if provided a request for notice, shall mail to the victim the following information:

(a) Within fifteen (15) days prior to the end of the sentence of the prisoner, notice of release upon expiration of sentence or notice of medical release.

(b) Within fifteen (15) days after the prisoner has died, notice of the death.

**SOURCES:** Laws, 1998, ch. 577, § 21, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Cross References** — Prosecutor notice requirements upon written request of victim, see § 99-43-9.

Notice regarding disposition and sentencing, see § 99-43-29.

Notice of post-arrest release or escape and post-sentencing information, see § 99-43-35.

Notice provided to victim by custodial agency, see § 99-43-41.

Statewide automated victim information and notification system generally, see §§ 99-45-1 et seq.

**§ 99-43-43. Victim statement or recording for Department of Corrections records; notice regarding parole or pardon proceedings; notice regarding change in custodial status proceedings.**

(1) Upon written request, the victim shall have the right to be notified that he or she may submit a written statement, or audio or video recording, which shall be entered into the prisoner's Department of Corrections records. The statement or recording shall be considered during any review for community status of the prisoner or prior to release of the prisoner.

(2) The victim shall have the right to be notified and allowed to submit a written or recorded statement when parole or pardon is considered.

(3) The victim shall have the right to be notified and allowed to submit a written or recorded statement when any change in custodial status is considered, whether such action be by executive order or judicial action.

**SOURCES:** Laws, 1998, ch. 577, § 22; Laws, 2007, ch. 587, § 10, eff from and after July 1, 2007.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**Amendment Notes** — The 2007 amendment added (3).

**§ 99-43-45. Testimony and preparation for criminal proceeding free from threat or fear of losing employment.**

The victim shall respond to a subpoena to testify in a criminal proceeding or participate in the reasonable preparation of criminal proceeding without loss of employment, intimidation or threat or fear of the loss of employment.

**SOURCES:** Laws, 1998, ch. 577, § 23, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**§ 99-43-47. Prosecutor assertion of victims' rights.**

The prosecuting attorney may assert any right to which the victim is entitled.

**SOURCES:** Laws, 1998, ch. 577, § 24, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

Section 26A of Article 14 of the Mississippi Constitution of 1890, as proposed by Laws of 1998, ch. 691 (Senate Concurrent Resolution No. 513), was ratified by the electorate on November 3, 1998, and was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

**§ 99-43-49. Failure to provide victim's right; effect; reasonable attempts to provide notice.**

The failure to provide a right, privilege or notice to a victim under this chapter shall not be grounds for the defendant to seek to have the conviction or sentence set aside, and any reasonable attempt to provide notice shall satisfy the requirements of this chapter.

**SOURCES:** Laws, 1998, ch. 577, § 25, eff from and after January 1, 1999.

**Editor's Note** — Laws of 1998, ch. 577, § 26, provides:

"SECTION 26. This act shall take effect and be in force from and after January 1, 1999, provided that the amendment to the Mississippi Constitution of 1890 proposed by Senate Concurrent Resolution No. 513, 1998 Regular Session, has been ratified by the people."

Senate Concurrent Resolution No. 513 of the 1998 Regular Session became Laws of 1998, ch. 691, and proposed the enactment of Section 26A, relating to crime victims' rights, into the Mississippi Constitution of 1890.

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## CHAPTER 45

### Statewide Automated Victim Information and Notification System

SEC.	
99-45-1.	System established to inform crime victims regarding status of criminal offenders.
99-45-3.	Law enforcement obligation to notify crime victims satisfied through participation in SAVIN program.
99-45-5.	Department of Corrections required to update offender information frequently; no cause of action created by failure of automated system to provide notice to victim.
99-45-7.	Cooperation among law enforcement agencies.
99-45-9.	Administration by Department of Corrections; Statewide Victims' Information and Notification System Fund created.

#### **§ 99-45-1. System established to inform crime victims regarding status of criminal offenders.**

The Department of Corrections shall establish a statewide automated victim information and notification (SAVIN) system that will do the following:

(a) Automatically notify a registered victim via their choice of telephone, letter, or email when any of the following events affect an offender housed in the Department of Corrections or any county jail in the state:

- (i) Is transferred or assigned to another facility;
- (ii) Is transferred to the custody of another agency outside the state;
- (iii) Is given a different security classification;
- (iv) Is released on temporary leave or otherwise;
- (v) Is discharged;
- (vi) Has escaped; or
- (vii) Has been served with a protective order that was requested by the victim.

(b) Automatically notify a registered victim via their choice of telephone, letter, or email, when an offender has:

- (i) An upcoming court event where the victim is entitled to be present;
- (ii) An upcoming parole or pardon hearing;
- (iii) A change in status of their parole or probation status including:
  1. A change in their supervision status; or
  2. A change in their address.

(c) Automatically notify a registered victim via their choice of telephone, letter, or email when a sex offender has:

- (i) Updated his profile information with the state sex offender registry;
- (ii) Become noncompliant with the state sex offender registry.

(d) Permit a crime victim to receive the most recent status report for an offender in the Department of Corrections, county jail, or sex offender registry by calling the SAVIN system on a toll free telephone number as well as by accessing the SAVIN system via a public web site.

(e) All victims calling the SAVIN program will be given the option to have live operator assistance to use the program on a 24 hour, 365 day per year basis.

(f) Permit a crime victim to register or update the victim's registration information for the SAVIN system by calling a toll free telephone number or accessing a public web site.

**SOURCES:** Laws, 2006, ch. 421, § 1, eff from and after July 1, 2006.

**Cross References** — Mississippi crime victims' bill of rights generally, see §§ 99-43-1 et seq.

**§ 99-45-3. Law enforcement obligation to notify crime victims satisfied through participation in SAVIN program.**

Participation in the SAVIN program and making offender and case data available on a timely basis to the SAVIN program will satisfy the Department of Corrections', sheriff's, and prosecuting attorney's obligation to notify the crime victim of an offender's custody status and the status of the offender's upcoming court events.

**SOURCES:** Laws, 2006, ch. 421, § 2, eff from and after July 1, 2006.

**Cross References** — Mississippi crime victims' bill of rights generally, see §§ 99-43-1 et seq.

**§ 99-45-5. Department of Corrections required to update offender information frequently; no cause of action created by failure of automated system to provide notice to victim.**

The Department of Corrections must ensure that the offender information contained within the automated victim notification system is updated frequently enough to timely notify a crime victim that an offender has been released, has been discharged, or has escaped. However, the failure of the automated victim notification system to provide notice to the victim does not establish a separate cause of action by the victim against the state, local officials, or against the Department of Corrections.

**SOURCES:** Laws, 2006, ch. 421, § 3, eff from and after July 1, 2006.

**Cross References** — Mississippi crime victims' bill of rights generally, see §§ 99-43-1 et seq.

**§ 99-45-7. Cooperation among law enforcement agencies.**

Law enforcement officers shall cooperate with the Department of Corrections in establishing and maintaining the automated victim notification system.

**SOURCES:** Laws, 2006, ch. 421, § 4, eff from and after July 1, 2006.

**§ 99-45-9. Administration by Department of Corrections; Statewide Victims' Information and Notification System Fund created.**

(1) The Department of Corrections shall administer the automated victim notification system. The cost of administering the system must be paid with appropriations made to the department and from federal grants and contracts.

(2) There is created in the State Treasury a special fund to be known as the Statewide Victims' Information and Notification System Fund. The purpose of the fund shall be to provide funding for the Statewide Victims' Information and Notification System. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the Mississippi Department of Corrections. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

- (a) Monies appropriated by the Legislature for the purposes of funding the Statewide Victims' Information and Notification System;
- (b) The interest accruing to the fund;
- (c) Monies received under the provisions of Section 99-19-73;
- (d) Monies received from the federal government;
- (e) Donations; and
- (f) Monies received from such other sources as may be provided by law.

**SOURCES:** Laws, 2006, ch. 421, § 5; Laws, 2007, ch. 578, § 2, eff from and after July 1, 2007.

**Amendment Notes** — The 2007 amendment added (2).





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